

FAIR LABOR STANDARDS AMENDMENTS OF 1985

HEARINGS BEFORE THE SUBCOMMITTEE ON LABOR OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES UNITED STATES SENATE NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1570

TO AMEND THE FAIR LABOR STANDARDS ACT OF 1938 TO EXCLUDE THE EMPLOYEES OF STATES AND POLITICAL SUBDIVISIONS OF STATES FROM THE PROVISIONS OF THAT ACT RELATING TO MAXIMUM HOURS, TO CLARIFY THE APPLICATION OF THAT ACT TO VOLUNTEERS, AND FOR OTHER PURPOSES

JULY 25 AND SEPTEMBER 10, 1985, WASHINGTON, DC
AUGUST 28, 1985, OKLAHOMA CITY, OK



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FAIR LABOR STANDARDS AMENDMENTS OF 1985

THURSDAY, JULY 25, 1985

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:35 a.m., in room 430, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Thurmond, Wallop, Matsunaga, and Simon.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning. Today is the first day of 3 days of hearings on the impact of the Supreme Court's recent decision in *Garcia v. San Antonio Metropolitan Transit Authority*, which held that the Fair Labor Standards Act is applicable to State and local governments.

This means that State and local governments will no longer have the flexibility to set work schedules for their employees without interference from the Federal Government.

In my opinion, Federal intrusion into the employer-employee relationship at the state and local level is totally unwarranted.

In my own State of Oklahoma, the department of public safety has informed me that prospective troopers attending an intensive stress-type academy will cost the State an additional \$68,000 per month in overtime for an average of 50 cadets because of these requirements.

The city of Stillwater has reported that *Garcia* decision will cost them \$624,000 this year alone; and these are certainly not isolated instances.

This subcommittee will be receiving testimony from other State and local officials to help us complete our analysis of the nationwide impact of this decision. After today's hearing, the second day will occur on August 28 in Oklahoma City, with the final day, September 10, in this room.

The evidence already presented to the Labor Subcommittee has led me to conclude that a legislative response to the *Garcia* decision is imperative. To that end, I plan to introduce legislation to cover three points.

First, the legislation will exempt volunteers who perform services for State and local governments from both the wage and hour provisions of the Fair Labor Standards Act. The most common example used in this area is volunteer firemen who, under the Department of Labor regulations, are presumed to be employees if

they receive more than \$2.50 per call as reimbursement for any expenses they may have incurred.

This is a serious problem which could be even more far reaching than just volunteer firefighters. For example, called into question would be a referee for the local high school basketball game or a schoolcrossing guard who also may receive some nominal fee. Now this local school district could find that time and attendance records are required to assure full compliance with all Fair Labor Standards Act requirements. The higher amount of this nominal fee to cover all reasonable expenses, the greater the likelihood that an employer-employee relationship would exist. Thus, more generous school districts may find that this generosity has brought them under the Federal wage-hour standards.

Second, the legislation I plan to introduce would exempt State and local governments from the overtime provisions of the Fair Labor Standards Act, but not the wage provisions. This restores the State and local governments' flexibility to schedule, for example, police and firefighters to best serve the needs of their own areas, without worrying about an emergency occurring at the end of the pay period or work cycle which will necessitate premium pay that State or local governments may not have.

The best example of this occurred here in Washington, DC, when two detectives were pulled off a homicide investigation by police officials who were concerned that the detectives would have to be paid overtime if they continued to work past the end of their shift.

I would also like to insert a copy of an article which explains that story in the Washington Post on July 10th and described those events.

[Article from the Washington Post follows:]



D.C. Police Take Detectives Off Slaying Probe to Avoid Overtime

By John Ward Anderson
Washington Post Staff Writer

It apparently was one of the shortest cases that D.C. homicide detectives Tom Arnold and Joe Schwartz had ever worked.

At 10:30 Monday night they left the office at 300 Indiana Ave. NW to investigate a fatal shooting at Harvard Street and Georgia Avenue NW. About an hour later they were back in the office, and the Criminal Investigation Division ordered them back to D.C. police headquarters for an unprecedented reason: police officials were concerned that

the detectives, who got off work at 11:30 p.m., would have to be paid overtime to continue working the case.

Two more investigators, Julia Crosby and Daniel Villars, were assigned to the case and worked it through the night. When their shift of duty was finished at 7:30 a.m., they, too, were ordered to go home, again because of overtime.

When a suspect in the slaying was arrested about a year ago, Detective Drayton Stanton agreed at the D.C. Superior Court arraignment, but because he had only limited knowledge of the case, the proceeding had to be postponed until today.

OVERTIME, FROM C1

and other police department sources who were familiar with the case.

Fulwood said the removal of investigators was due to a "misinterpretation" of a July 3 police memo that attempted to spell out new guidelines on when and how police officers should be paid overtime.

The new guidelines were necessary, Fulwood said, because of a recent Supreme Court ruling that police officers and firefighters nationwide are covered by the federal Fair Labor Standards Act.

Previously, D.C. police officers, who were not covered by the act, could work overtime in exchange

While homicide officials and investigators reacted with anger and frustration at what one termed the "round robin" of detectives assigned to the case, police officials—embarrassed at the way the investigation was handled—said a misinterpretation of a memo on work hours caused the confusion.

Gary Hawkins, labor committee chairman of the Fraternal Order of Police, said the way the case was handled was "a disgrace." "Any time an investigation is being conducted, when the evidence is freshest and people's memories are freshest is the most productive time. The idea of pulling people

off at that time of an investigation is ludicrous," Hawkins said.

"We certainly are not going to stop our job as police officers because someone is going to eat up [compensatory] time or overtime," said Assistant Chief of Police Isaac Fulwood Jr., who called the removal of the original detectives "unacceptable."

"It should never have happened," Fulwood said. "They should have stayed on the scene and finished the case."

The victim in the case was identified by police as Duane Lee Taylor, 18, of 589 Columbia Rd. NW, who was shot once in the upper right chest and was taken by D.C.

Fire Department ambulance to the Washington Hospital Center, where he died a short time later.

Police said a 16-year-old Northwest Washington youth, whose name was not released, was arrested about 1 p.m. yesterday and charged with second-degree murder in the slaying.

No officials or investigators in the homicide unit would speak on the record about the slaying or the removal of the original detectives. They said they would not talk with the press. Details were provided by homicide officials, investigators,

See OVERTIME, C7, Col. 1

Senator NICKLES. Finally, in my bill, an effective date of Feb. 19, 1985, the date of the Supreme Court decision, is contemplated.

I have had several conversations on this matter with administration officials and, while they assure me that the administration will not support legislation in this area unless there is an active and coordinated support for it by State and local governments, I am confident, from the work that we have done and working with State and local governments and officials, county officials and others, that support will be there, and that we will have a coordinated legislative response.

Again, I look forward to working with all individuals on this legislation, and I hope we will be able to come up with a positive remedy that will again give the States and local governments the flexibilities that they have had for years.

We have a number of distinguished panelists, the first of which is Senator Pete Wilson from California, and Congressman John Porter from Illinois.

Senator Wilson, you have introduced legislation in this area; you have indicated a strong interest. I appreciate that, and I look forward to working with you in this area, as well.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Thank you very much, Mr. Chairman.

As you have indicated, I have introduced legislation, S. 1434, which would relieve State and local governments from the mandate imposed on them by the *Garcia* decision to pay overtime in cash, and to lose the traditional desirability that they have enjoyed in being able to have the option of compensating their employees with compensatory time off.

Mr. Chairman, there are a number of reasons to introduce this simple legislation, and I will submit for inclusion in the record a longer statement, but here I would summarize these several points.

One of them, Justice O'Connor had noted, with sad consequence, in her dissenting opinion in the *Garcia* decision. She said, "With the abandonment of the *Usery* decision, all that stands between the remaining essentials of State sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."

Our colleague, Senator Thurmond, in cosponsoring S. 1434, has indicated a similar concern about the erosion of the 10th amendment. In his floor statement in support of the bill, Senator Thurmond stated, "When the Federal Government seeks to impose its will on States regarding matters within the jurisdictions of States, I believe this to be violative of the intentions of our Founding Fathers."

Mr Chairman, unhappily, Justice O'Connor and Senator Thurmond are absolutely correct. The Fair Labor Standards Act, in imposing this requirement on State and local governments, has left little of the 10th amendment.

Now, let me emphasize that S. 1434 does not seek to remove State and local governments from complying with the requirements of the child labor laws, minimum wage standards, or the Equal Pay Act; it goes only to the point that they should have, as

they have had, the flexibility to manage their affairs where they are authorized by State law, and have chosen to engage in collective bargaining, State and local governments and their employees should be able to bargain for a resolution of the problem of how to best compensate their employees for overtime.

Mr. Chairman, your statement that included entering into the record a clipping from the Washington Post that reported the story about the three shifts of homicide detectives, I think, makes the point with abundant clarity. The point, very simply, is this: A homicide detective can't leave an investigation because his shift is over without imperiling the investigation; a firefighter cannot leave a fire because it's 4 o'clock and his time is up; psychiatric workers who are required to put in long, long hours of overtime, and others who deal with crisis situations, certainly should receive the same consideration that Congress has given in exempting the employee who operates the roller coaster at Coney Island, the sales clerk at local drug stores, and the ticket takers at our movie theaters. What we are doing by this legislation, Mr. Chairman, is simply adding one more exemption to the 30 existing exemptions to maximum hours provisions of the Fair Labor Standards Act.

I want to emphasize, as you have, that the *Garcia* decision has enormous cost implications to State and local governments as you will hear, I am sure, in quite specific detail from the list of distinguished witnesses that follow. I think it no surprise that the number of cosponsors, who now number 15 on S. 1434, include former Governors, former mayors, former city attorneys, and others who have been involved with managing State and local governmental affairs.

Now, States fall into roughly two categories Mr. Chairman. There are some States in which there has been no lid placed on the ability to raise revenues, so the hundreds of thousands, or the millions, or the tens of millions—in the case of my State, the estimate is \$300 million—that it will cost to comply with *Garcia* have to be raised in one of two ways because, clearly, what *Garcia* requires is that State and local governments in the future are mandated to budget cash payments for employed overtime.

Well, what that means, in a State that has no revenue limitation is that, of course, that State is free to raise revenue, to increase taxes in order to comply with the incredibly expensive mandate of the *Garcia* decision. But in other States, or in localities like California which do have, by vote of the people, a revenue limitation imposed, that option is not available, and Governors in States like that, mayors and city managers in States like that are faced with the necessity to not only set priorities but, must budget for the overtime requirements for, most urgent priorities, public safety for example, and cut back on the other desirable things which their governments would otherwise do, and which they are now engaged in doing.

They will have to cut back on park and recreation services, on library services, on health services, on senior citizens services.

Mr. Chairman, Congress has no business sitting as the city council of Council Bluffs, IA, or Lawton, OK, or San Diego, CA; they have no business doing that. I resent it—I resented it as 11 years as mayor of San Diego, and I resent it now as a U.S. Senator.

Justice O'Connor and Senator Thurmond have stated it quite adequately: we are threatening the 10th amendment with meaninglessness, and we are threatening those State and local governments with an inflexibility in their own affairs that will mean they cannot manage their jurisdiction in accordance with the priorities as they see them rather than as we see them, from this distant, remote, well-intentioned but misguided vantage point.

Mr. Chairman, I would only add that collective bargaining exists under the authority of State law in many places and in those places local governments have long since collectively bargained with their employees, as I did in California, to resolve the overtime issue. In almost every instance, they have said, "We will pay some cash at time and a half, and what we can't afford in that respect, we will pay in compensatory time off."

Mr. Chairman, I will make available to you a transcript from a hearing that I conducted under the auspices of the Joint Economic Committee.

To me, the most interesting testimony was not just the eloquent testimony of State and local officials, but the testimony of a homicide detective from the Los Angeles Police Department who also, interestingly enough, was a former president of the Police Officers Union in Los Angeles. His statement, summarized, was that police officers need to have the option of compensatory time off—other public safety employees need it; psychiatric workers need time to get their head straight. Deputies in southern counties—in Alabama, we were told by a commissioner from Alabama—would rather have the time than the money. This homicide detective said, "Not only do we need the time off because of the pressure of the work we do, it's the kind of work that does not allow it to be monitored on a 9-to-5 basis." And, this point, I think, is made, perhaps compellingly, by that news story that you have inserted in the record, Mr. Chairman.

Well, I will not exceed my time, yet perhaps I have exceeded what the surgeon who attended me at Bethesda stated was, safe blood pressure—I get excited when I talk about this subject.

I welcome the attention that you and this distinguished subcommittee have given to it. I earnestly hope that we do not have to let a year go by before we can give some relief to State and local government. It will cost them immeasurably, not only in money, but in the kind of interference that will deny them the flexibility that they so desperately require to manage and stretch resources to meet the rising need for services.

Thank you.

[The prepared statement of Senator Wilson follows:]

TESTIMONY BY THE HONORABLE PETE WILSON
UNITED STATES SENATOR FOR STATE OF CALIFORNIA

Thank you Mr. Chairman for the opportunity to testify before this distinguished Subcommittee on the impact of the Supreme Court decision Garcia v. San Antonio Metropolitan Transit Authority. The Garcia decision poses one of the greatest threats to the continued fiscal and political viability of state and local governments that our Nation presently faces. It is a blatant denigration of the sovereign right of states and municipalities to manage their everyday governmental responsibilities.

In a 5 to 4 decision, the United States Supreme Court overruled nine years of sound judicial precedent and held that the "traditional state functions" of state and local governments are not exempt from congressional regulation under the Commerce Power. Specifically, the Garcia decision makes the Fair Labor Standards Act (FLSA) applicable to all labor functions of state and local government. Among other things, the FLSA prohibits state and local governments from rewarding their employees with compensatory time-off (comp time) for the overtime hours they work. Prior to Garcia, these labor decisions were regulated by state labor laws and, of course, the dictates of collective bargaining agreements.

I question whether anything has occurred since the landmark Usery decision -- which held that "traditional state functions" are exempt from congressional regulation -- that warrants the Supreme Court's insistence now upon federal intrusion into the decisions rightfully made by state and local governments. Nevertheless, the Supreme Court used the Garcia case to signal the death knell to the 10th Amendment to the United States Constitution. Justice O'Connor noted this sad consequence in her dissenting opinion as follows: "With the abandonment of Usery, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint."

Mr. Chairman, the Supreme Court has abdicated its role as congressional watchdog when it comes to the federal government's impinging on state sovereignty. That is why I have introduced legislation, S. 1434, to return the autonomy to state and local governments over their labor relations functions that is mandated by the 10th Amendment. I have been joined by 15 of my colleagues who also feel that Garcia not only was wrongly decided but that it will create a financial nightmare for state and local government and could jeopardize the public's safety.

S. 1434 exempts state and local governments, and their employees, from the inflexible maximum hours provisions of the FLSA. Exempting certain employees from FLSA coverage is not a novel concept, however. Currently, there are some 30 exemptions to the maximum hours provisions. These exemptions include a broad range of occupations such as retail and service establishment employees, amusement and recreational establishment employees, agricultural and horticultural employees, newspaper and radio employees, and "professionals," "executives," and sales persons.

Congress exempted employees in these occupations from certain provisions of the FLSA because these employees have generally worked nontraditional schedules, and it makes no sense to impose inflexible requirements upon them. Certainly, if Congress can exempt the employee who operates the rollercoaster at Coney Island, the sales clerk at the local drug stores, and the ticket-takers at our movie theaters, we have precedent to exempt our state and local governments.

Mr. Chairman, I want to emphasize that this legislation will not exempt states and their political subdivisions from any other provisions of the FLSA such as the minimum wage requirements, The Equal Pay Act, or the child labor prohibitions.

Mr. Chairman, I may not have introduced this legislation if the Supreme Court had been rectifying employment abuses by state and local governments. However, nowhere in the Court's lengthy opinion is there one citation of an injustice committed by local government. That is because state and local governments are not guilty of any injustice.

The FLSA was enacted in 1938 in response to the economic and employment crisis created by the Great Depression and to address the intolerable employment conditions that many Americans were forced to endure. While well-intentioned, the underlying precepts of the FLSA have little relation to today's actual state and local government employer/employee relationship. These governmental employers are not running sweat shops or child labor camps. However, these governmental employers are forced by local tax reduction efforts and reduced federal assistance to develop creative employment strategies, such as comp time and flexible scheduling, in order to provide needed community services within the constraints of extremely tight budgets.

The state and local government employer/employee relationship has not gone unregulated. To date, state laws and collective bargaining rights have been adequate to ensure that state and local government employees are treated and compensated fairly.

Mr. Chairman, the state and local governments of this Nation need legislative relief immediately. A Joint Economic Committee hearing I chaired on June 25th provided evidence that the FLSA's overtime requirements will cost states and municipal governments across the Nation billions of dollars. From Mesa, Arizona to Macon, Georgia, the Garcia decision will force local governments to scrimp to find extra funds, without receiving any extra services, to come into compliance with a law that has little relation to them or their employees. California alone, it has been estimated, will have to spend some \$300,000,000 in order to comply with the FLSA's rigid requirements. While the greatest increase in costs in California will be in the public safety and fire suppression areas, programs as varied as the California Conservation Corps and the State Department of Fish and Game will also be affected.

However, the most devastating impact of Garcia will be its effect on public safety. A recent article in the Washington Post described a telling example of how this would occur. Police officers in the District of Columbia were pulled off of a murder investigation by their supervisors, so that these officers would not accrue premium overtime pay. When a new team was put on the investigation, they too were asked to discontinue the investigation before overtime hours had accrued.

When the suspect was finally apprehended, the detectives who began the investigation were so unfamiliar with the details of the case that the suspect's arraignment had to be postponed. Forcing local governments to implement policies such as these will jeopardize the safety of people in communities throughout the Nation.

The potential for tragedy is readily apparent if a local government is faced with a crisis situation such as a natural disaster. Many local governments operate under mutual aid agreements where fire fighter services are shared between local communities when one locality does not have the manpower to ensure the public's safety. If a local government's budget is not ample to pay premium overtime, and it is restricted by the FLSA from rewarding its fire fighters with comp time, an imminent threat to a community's safety may be created.

Mr. Chairman, I have only highlighted some of the problems that the JEC hearing uncovered. The outstanding witnesses that will be testifying today I am sure will offer insightful examples of how the the Garcia decision will change the fundamental nature of the way local governments provide services to their residents.

I testify here today not only as a Senator who has sponsored legislation to relieve state and local governments from the harsh effect of the Garcia decision, but also as a former state legislator and Mayor of San Diego, who feels that the 10th Amendment plays a critical role in our Democracy.

Our founding fathers added the 10th Amendment to the Constitution not as surplusage but as an assurance that a despotic, centralized government would not swallow the political viability of the states -- and ultimately the residents of those states. These pioneers of modern political science felt that reserving political power to the states was essential to protecting the basic liberties that were fundamental to the formation of our young Nation. However, the Garcia decision "downgrades federalism and the basic rights of the states from the status of constitutional guarantees to that of political questions and procedural issues," said Kenneth Howard, a noted intergovernmental affairs expert.

Many of us here in Congress have our political roots in local government, and we realize that allowing a large bureaucracy thousands of miles away from many state and local governments to regulate the functions inherent to the viability of these governments is not only unfair but unworkable. Senators Garn and Lugar, original cosponsors of S. 1434 and former mayors, I am sure could cite many examples of their frustrations in trying to comply with rigid, complex laws and regulations that were drafted by bureaucrats or passed by Congress without deference to the concerns of the local governments that they were regulating.

I am very pleased that Senator Thurmond, whose commitment to federalism is heralded, has also joined me in introducing this bill. In his floor statement in support of the bill, Senator Thurmond stated "[W]hen the federal government seeks to impose its will on states regarding matters within the jurisdictions of states, I believe this to be violative of the intentions of our founding fathers." Senator Thurmond's experience as a former governor offers him a special insight into the workings of state government. I commend his concern for, and commitment to, the state and local governments of this land.

I am pleased that S. 1434 already has 15 cosponsors. It has been endorsed or supported by state and local government employees, as well as by many state and local governments and their National coalitions. I am confident that restoring vigor to the 10th Amendment will continue to be a strong bipartisan effort.

State and local government employees should have the flexibility that is prohibited under the FLSA, and our state and local governments need the autonomy to deal with their special labor situations -- pragmatism requires it and the Constitution mandates it.

I look forward to working with you Mr. Chairman and with the other distinguished members of this Subcommittee -- from both sides of the aisle.

Thank you again for this opportunity to voice my concerns and to familiarize the Subcommittee further with my legislation.

Senator NICKLES. Thank you very much.

Senators Wallop, Simon, and Thurmond need to open the Senate at 10; if you don't mind, we will let them make their comments.

Senator THURMOND. Thank you very much.

Mr. Chairman, first of all, I would like to take this opportunity to commend you for scheduling this hearing, and for all of the research, investigation, and planning you have done to address the disastrous financial implications of the *Garcia* decision to State and local governments.

Last week, I was pleased to join Senator Wilson as an original cosponsor of legislation which would reverse this decision. I commend him for his fine leadership on this subject.

It would return our Nation to the law prior to *Garcia*, which gave deference to the sound principles of federalism, as set forth in the 10th amendment of the Constitution.

Mr. Chairman, I am firmly committed to working with you, Senator Wilson, and our colleagues from both parties toward the speedy passage of legislation which will remedy the impact of *Garcia*.

We have an extremely distinguished group of witnesses who will testify today. I particularly would like to welcome Governors Ashcroft, Lamm, and Martin, Lieutenant Governor Hobby, Mayor Voinovich and Mayor John E. Bourne, Jr., of North Charleston, SC.

North Charleston was incorporated in 1972. Since that time Mayor Bourne has served as the first and only mayor of that fine city. He is now in his fourth term. John Bourne has not only done an outstanding job as mayor of North Charleston, he is also an excellent spokesman on issues which affect municipal governments in our country.

On the national level, he has been very active in the National League of Cities and the U.S. Conference of Mayors. Today he will testify on behalf of that organization, and will also inform us of the particular administrative and budgetary problems facing North Charleston as a result of *Garcia*.

Mayor Bourne is a devoted churchman and a very active civic leader. He and his lovely wife, Blanche, have three children, and I want to welcome them here today.

Since the city of North Charleston was incorporated in 1972, it has now become the third largest city in South Carolina.

I would also like to take special note of the fact that Governor Martin is also a native South Carolinian. Despite the fact that he is now a Tar Heel, many South Carolinians, including his mother who lives in Columbia, SC, numerous relatives, and I, are all proud of his many accomplishments.

Mr. Chairman, thank you again for allowing me to appear today and deliver these remarks. Regrettably, my duties as a conferee on the Defense authorization bill prohibit me from remaining for the full hearing today. However, I look forward to reviewing the testimony presented on this issue of such vital importance to our nation, and I do appreciate you taking me at this time so that I can go and open the Senate.

I want to tell Mayor Bourne, if he's here yet—yes, I see him, he's right over here—we are delighted to have you, and I hope you will come by before you leave.

Thank you very much.

Senator NICKLES. Thank you very much, Senator Thurmond. We appreciate your coming.

Senator Wallop, do you have any opening comments?

Senator WALLOP. Yes, Mr. Chairman, I do.

I appreciate the opportunity to thank Senator Wilson for his bill.

Earlier in the year when the Supreme Court decided that the Fair Labor Standards Act applied to State governments and their political subdivisions, it was a reversal of the 1976 decision, *National League of Cities v. Usery*, which had held that the act did not apply, constitutionally, to the States when "traditional" government functions were involved.

I am now aware that Congress has subsequently repealed the 10th amendment, and that bare majority of Supreme Court Justices have decided that we did just that—it gave us powers which I don't think the Constitution has given us; presumably, the public has a say in the repeal of amendments.

The interpretation in the *Usery* case properly preserved, in my estimation, the rights of the States. This constitutional relationship has been turned topsy by the *Garcia* decision.

While other members of this committee, such as my colleague, Senator Thurmond, have, for decades, led the fight for States' rights, I can assure everyone in this room that this is a battle that is of paramount importance to this Western State Senator.

I realize the numerous obstacles to overturning this decision. This is, perhaps, not the time to fight that issue, but we are confronted with serious problems arising from the *Garcia* case.

For now, we must attend to legislative and regulatory relief for any unnecessary burden to the State and local governments. I assume that the Labor Department has resolved issues, such as how to treat voluntary services provided by public employees under this act, and I look forward to that testimony.

One of the major issues to be resolved is whether compensatory time agreements of any sort will now be prohibited. At the State level, these agreements mainly affect fire and law enforcement officials or, in my State, the highway maintenance employees in the wintertime who simply cannot turn off a snow plow after 8 hours on the top of a mountain road and come home—it's idiotic. And they have accepted that as part of their life; many of them work because they get the compensatory time in the summer when they can go and enjoy the mountains. And they choose that employment because of that opportunity. Now, presumably, this is not an option that is allowed them or their State employer.

These sensible policies would be prohibited by the Fair Labor Standards Act, and if anybody can tell me what is fair about the Fair Labor Standards Act, by the bias this way, I would be happy to sit and listen.

Senator Wilson has introduced S. 1434, which is a bill to exempt public employees from the overtime provisions of the act. And that, presumably, takes care of the compensatory time problem for public employees, and it is one solution.

There is another approach embodied in S. 798, a bill I introduced with my colleague, Senator Simpson, earlier this year. Our bill rec-

ognizes that the compensatory time issue is not just a public employee issue.

In fact, this legislation was drafted in response brought to my attention by the employees of a private employer in the State of Wyoming who had a number of families who wanted to work 3 or 4 days a week and have the rest of the time to spend with their families—it suited them—and they are prohibited from it. It was a request by the employees to the employer.

His firm attempted to use a compensatory time program to ensure that these employees would have stable wages throughout the year, despite the erratic annual production hours that his business had. S. 798 would allow the use of a compensatory time program in place of the maximum hours provisions of the Fair Labor Standards Act.

It is a sound approach; unfortunately, we have received very little attention until the *Garcia* decision, but now people seem to be able to understand what the issue is about. In fact, this is the third Congress in which I have introduced this legislation, and maybe we can move forward with the bill, as people in private employ understand that it is not only a problem for the employer—the public employers, but it is a problem for employees, some of whom badly want to have that kind of work arrangement. And it seems idiotic for Congress to say that they may not, in pursuit of their own lifestyle and in agreement with their employer, do such a thing, so perhaps we can look a little broader in this moment where people see it.

[The prepared statement of Senator Wallop follows:]

STATEMENT TO THE LABOR SUBCOMMITTEE
REGARDING THE GARCIA DECISION
BY SENATOR MALCOLM WALLOP

Earlier this year, the Supreme Court decided that the federal Fair Labor Standards Act applied to State governments and their political subdivisions. This decision, Garcia vs. San Antonio METRO, was a reversal of the 1976 decision, National League of Cities vs. Usery, which had held that the Act did not apply constitutionally to the States when "traditional" government functions were involved. I am not aware that the Congress has subsequently repealed the Tenth Amendment. However, five, out of nine, Supreme Court justices, a bare majority, have decided that the Fair Labor Standards Act overrules the Tenth Amendment.

Previous to Garcia, the law of the land stated that State and local employees, engaged in traditional public responsibilities, would not be covered by federal labor laws. Public employees engaged in "non-traditional" activities would be covered.

This interpretation properly preserved the rights of the States. This constitutional relationship has been turned topsy turvy by the Garcia decision. While other members of this Committee, such as my colleague, Senator Thurmond, have for decades lead the fight for States' rights, I can assure everyone in this room that this is a battle that is of paramount importance to this Western State Senator.

I realize the numerous obstacles to overturning this decision. This is perhaps not the time to fight the issue. But we are confronted with several serious problems arising from the Garcia case. For now, we must attend to legislative and regulatory relief for any unnecessary burden to the State and local governments. I assume that the Labor Department has resolved issues such as how to treat voluntary services provided by a public employee under this Act, and I look forward to their testimony.

One of the major issues to be resolved is whether compensatory time agreements will now be prohibited. Such agreements mainly affect firemen and law enforcement officials, or in my State road maintenance people in the winter. Due to the long shifts such public employees work, they have received compensatory time off to compensate them for their work schedules. This sensible policy would be prohibited by the Fair Labor Standards Act. But, there is nothing fair about it.

Senator Wilson has introduced S. 1434, a bill to exempt public employees from the overtime provisions of the Act. This would presumably take care of the compensatory time problem. It is one solution. There is another approach embodied in S. 798, a bill I introduced with my colleague from Wyoming, Senator Simpson, earlier this year.

Our bill recognizes that the compensatory time issue is not just a public employee issue. In fact, this legislation was drafted in response to a problem brought to my attention by a private employer in Wyoming. His firm attempted to use a compensatory time program to ensure that employees would have stable wages throughout the year despite the erratic annual production hours of the business. S. 798 would allow the use of a compensatory time program in place of the maximum hours provisions of the Fair Labor Standards Act. It is a sound approach, but we have received little attention, until the Garcia decision. In fact, this is the third Congress in which I have introduced this legislation. Hopefully, we can finally move forward with the bill. We would resolve the problems of the public employers and employees while providing a worthwhile right to the private sector.

Senator NICKLES. Thank you, Senator Wallop.

Senator Simon.

Senator SIMON. Thank you, Mr. Chairman.

I am not a member of this subcommittee, and you are kind to let me sit in for a minute. Unfortunately, we have a Judiciary Committee—Senator Wallop, we have your colleague's Immigration Bill, and I'm going to have to head down there.

The application of the Fair Labor Standards Act to public Employees is an important area where we are going to have to find some practical answers. I understand, Mr. Chairman, that in addition to the legislation introduced by Senator Wilson and Wallop, you are crafting some legislation.

Senator NICKLES. That is correct.

Senator SIMON. I think it's important that whatever we develop, that it be retroactive to the time of the *Garcia* decision, and that we provide answers for all of the practical questions that mayors and other local government leaders face.

I see my colleague, John Porter from Illinois, here. He represents a number of communities where—for example, you have volunteer fire departments where some volunteers receive minimal pay such as \$5 a run. It's kind of a nominal compensation, and all of a sudden Illinois Fire Protection Districts are faced with all kinds of budgetary problems.

I think this is an area where we need some good nuts and bolts answers, and I hope that this subcommittee and our full committee can craft some answers that will be helpful and fair to everyone.

I appreciate the opportunity to sit in—I'm going to be in and out, as time permits.

Thank you very much.

[The prepared statement of Senator Simon follows:]

PREPARED STATEMENT OF SENATOR PAUL SIMON

Senator SIMON. Good Morning Mr. Chairman, members of the Subcommittee on Labor, I am pleased to join you this morning as you hold hearings on the impact of the recent decision of the Supreme Court in *Garcia v. San Antonio Metropolitan Area Transit Authority* on State and local governments. While the dollar impact of the Court's decision could be particularly devastating to small municipal and county governments—which are *not* already in compliance with the Fair Labor Standards Act—I want to commend the chairman for holding these hearings and for carefully developing a finely tuned bill to remedy the problem.

Senator Wilson has already introduced S. 1434, along with several of my colleagues, I cannot support S. 1434 in its present form, however I am interested in the approach being developed by Chairman Nickles and hope to work with him in finding a solution to the fiscal and administrative problems forced on the States and numerous local governments by the *Garcia* decision.

In Illinois, there are four principal issues facing local government leaders, especially suburban and rural fire protection districts and local law enforcement officials, (1) coverage—many have so few "employees", they are uncertain if they qualify for the five employee exemption; (2) volunteers—rural and suburban fire protection districts use personnel who are compensated on a 'per run' basis and are classified as "volunteers"; (3) enforcement—should they comply now, await a Labor Department investigation or expose the Government entity to expensive private litigation?; and (4) how can they afford the cost of compliance given local revenues and the likely loss of Federal revenue-sharing funds, et cetera?

As I understand the chairman's legislation that he is developing, it will address each of these important areas by:

Exempt and clarify the term volunteer under the Fair Labor Standards Act;

Exempt all State and local government employees from the overtime provisions of the act; and

Establish an April 15, 1985 effective date for these amendments, which will retroactively close the exposure of many revenue-poor local governments to suit in light of *Garcia*.

This appears to be a carefully crafted response to the issue before us and I am hopeful, after these hearings and further study, that the Committee on Labor and Human Resources can take positive action on this problem prior to end of the first session.

I welcome the witnesses to the committee this morning and appreciate the Chairman having allowed me to sit with him today. I will have to leave around 10 o'clock because of an executive session in the Judiciary Committee on the Immigration bill.

Senator NICKLES. Thank you, Senator Simon. I do look forward to working with you. In our legislation, we are looking at incorporating—at least what Senator Wilson has done in his language, which deals with allowing comp time and making it retroactive back to either the court date or the DOL date. We are also trying to come up with something on the volunteer issues as well, so we don't penalize those communities and volunteers who have been willing to make those types of arrangements. We look forward to working with you. Thank you very much

Congressman Porter.

STATEMENT OF HON. JOHN E. PORTER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS

Mr. PORTER. Mr. Chairman, I appreciate very much the opportunity to testify this morning, and I want to commend you and Senator Wilson, and others who have offered corrective legislation in this area.

I don't think it's really relevant to talk about whether the decision of the Court in *Garcia* was a good or bad one; however, it is the responsibility of the Congress to act and, I believe, act quickly, as my colleague from Illinois has indicated. We also must make certain that the provisions that are enacted are retroactive so that we continue current agreements between State and local governments and their employees

The Court's decision will clearly have an effect of burdening State and local officials with added costs and paperwork while they are attempting to deal with reductions in Federal aid, resulting from our attempt to grapple with the deficit. It will add no value, that I can see, to local government services, yet will end up costing the taxpayers substantially more.

I also think the point needs to be made here that it will cost jobs because I understand municipalities will be forced to shift additional resources toward those who are already highly paid and exempt. In the process, people who are not exempt probably will lose their jobs and be injured by the decision, unless it is corrected. The option of providing compensatory time off, that you have referred to, Mr. Chairman, will be lost.

I think that the point that you made about the D.C. detectives being pulled off the case after their shift because they would have to be paid overtime, is a ridiculous example of what occurs under this decision. However, beyond that, I think the point that Senator Wilson made that those same detectives need the compensatory time off is a good one.

There's an article in the Wall Street Journal that quotes from the testimony of Los Angeles Detective Carlton Olson before the

Joint Economic Committee who said, "Without the opportunity to take time off at the end of these lengthy narcotic and vice investigations, we'd probably be patients in mental hospitals rather than out on the street doing our jobs." So I think that's terribly important; it's the opposite side of the coin but it also is important to our considerations of this committee.

If I may, Mr. Chairman, I would like to insert in the record letters that I have received from municipal and school district officials in my district in Illinois as to the effect this decision might have upon them, and give you some of the highlights of what they have said.

[The letters referred to follows:]



ILLINOIS STATE BAR ASSOCIATION

SECTION ON LOCAL GOVERNMENT LAW

May 8, 1985

Honorable John Porter
 United States Representative
 104 Wilmot Road
 Deerfield, Illinois 60015

MAY 9 1985

MAY 10 1985

Dear Representative Porter:

The purpose of this letter is to express our strong concern over the effects of the recent United States Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority. This concern is expressed on behalf of the Local Government Section of the Illinois State Bar Association. The Local Government Section of the Illinois State Bar Association is comprised of approximately 1400 attorneys many of whom represent municipalities and units of local government within the State of Illinois. The membership of the Local Government Section in the aggregate represents literally thousands of municipalities and units of local government within the State.

Illinois municipalities and units of local government have operated for years without the necessity of regulation under the Fair Labor Standards Act. In the last two years virtually all public sector employers have become affected by the enactment of collective bargaining laws in Illinois which are regulated by three separate labor boards within the State. The Supreme Court's decision in Garcia has come at precisely the same moment that public employers and public employees have achieved labor harmony through collective bargaining. Neither current nor future collective bargaining agreements can afford federal interference through imposition of the Fair Labor Standards Act requirements.

The majority opinion in Garcia relegates to Congress the responsibility for relieving municipalities of the burden of its Garcia decision. We strongly urge you to take the initiative and support amendments which will be introduced

by the National League of Cities to obviate the burdensome effect of the Supreme Court's Garcia decision upon municipalities and units of local government. The members of the Illinois State Bar Association's Local Government Section look forward to your leadership and support on this critical issue.

Very truly yours,

ILLINOIS STATE BAR ASSOCIATION
LOCAL GOVERNMENT SECTION COUNCIL

By *Fay Hartog-Rapp*

Fay Hartog-Rapp
Chair, Legislative Subcommittee

FHR/jo

cc: Members of the Local
Government Section Council



COUNTRYSIDE FIRE PROTECTION DISTRICT

600 N. DEERPATH DRIVE
VERNON HILLS, ILLINOIS 60061
312-367-5511

RICHARD A. THOMSON, CHIEF

OLIVER R. ASPEGREN, JR., PRESIDENT

June 14, 1985

The Honorable John Porter
House of Representatives
1530 Longworth House Office Building
Washington, D.C. 20510

Dear Mr. Porter:

I am writing to you to express a grave concern over a recent Supreme Court decision, Garcia vs. San Antonio Metropolitan Transit Authority. The impact of this decision could be devastating to say the least. Unfortunately, the ones ultimately to suffer will be citizens we serve because the end result will be cuts in the delivery of fire protection and emergency medical services.

I'm sure you are aware of the uniqueness of the scheduling in the fire service. Historically, the 56 hour work week has presented itself as the most logical and cost effective means of delivering fire and ambulance service. How the Supreme Court can possibly compare firefighters with bus drivers or any other municipal employees is beyond my comprehension.

It is my hope that you share my concern for maintaining the level of service we now provide our citizens and that you will arrive at a decision in support of any necessary change in the law.

Thank you for your consideration.

Sincerely,

A. Lewis Landry

A. Lewis Landry, Deputy Chief

ALL:gk

VILLAGE OF

MAY 1985



1225 CEDAR LANE

NORTHBROOK, ILLINOIS 60062

(312) 272-6050

BOARD OF TRUSTEES

Troy L. Miller
 Sherwin S. Zeitlin
 Robert F. Donahue

Philip Gray
 Robert J. Jaeger
 Daniel J. Walker

Sandra D. Kent

Village Clerk

PRESIDENT
 Richard T. Falcone

Village Manager
 Robert A. Weidaw

May 3, 1985

U.S. Congressman John Porter
 1530 Longworth Office Building
 Washington DC 20510

Dear Congressman Porter:

The Village of Northbrook is among literally thousands of state and local governments which have become subject to the Fair Labor Standards Act as a result of the recent Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority. Our preliminary estimates suggest this decision could cost the Village's taxpayers hundreds of thousands of dollars in cash or lost services.

As the court's decision merely confirms an Act of Congress, we are anxious for information as to the likelihood that Congress may provide some relief. Can you advise us regarding your position on this extension of the Act to state and local government? Do you intend to introduce or support legislation to provide relief to local governments in such areas as:

- Substitution of compensatory time off for overtime pay at the employee's discretion;
- extending the professional exemption to include police and fire personnel; or
- repealing the extension of the Act to state and local government?

We are certain you can appreciate the extremely difficult circumstances in which governments at all levels find themselves. The Federal deficit is leading the Congress towards reducing expenditures frequently at the expense of state and local government. The extension of this Act to our jurisdictions will only aggravate our circumstance. It will add no value to our services, yet cost the taxpayers more. Worse, it may cost jobs as we are compelled to shift additional resources towards those who are already among the best compensated.

Will you help us with this problem? Please advise us of your intentions.

Sincerely,

Richard T. Falcone
 Richard T. Falcone
 Village President

RTF/bg



VILLAGE OF WHEELING

255 WEST DUNDEE ROAD - P.O. BOX V - WHEELING, ILLINOIS 60090

(312) 459-2600

OFFICE OF VILLAGE PRESIDENT

June 13, 1985

Representative John E. Porter
Longworth Office Bldg. - Room 1530
Washington, DC 20515

Dear Representative Porter:

The U. S. Supreme Court's decision in Garcia, presents some serious problems for state and local governments. It could destroy state sovereignty and local authority.

While lobbying to amend FLSA, your office is critical to providing administrative relief under the Department of Labor's regulatory authority.

On behalf of the Village of Wheeling we ask that you work with the representatives of the National Public Employer Labor Relations Association to develop rules which provide some flexibility for key operations such as fire and police protection.

We are strongly opposed to the destruction of state and local authority.

Sincerely,

Sheila H. Schultz

Sheila H. Schultz
Village President

br

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 EAST MONROE STREET
CHICAGO, ILLINOIS 60603

LOS ANGELES OFFICE
2028 CENTURY PARK EAST
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AREA CODE 202 463-2400

NEW YORK OFFICE
520 MADISON AVENUE
NEW YORK, NEW YORK 10022
AREA CODE 212 715-9000

July 18, 1985

WRITER'S DIRECT DIAL

(312) _____

Mr. Chet Stroyny
Office of Congressman John E. Porter
1131 Longworth Building
United States House of Representatives
Washington, D.C. 20515

Re: Garcia Decision

Dear Chet:

Pursuant to our conversation, I have enclosed a memorandum regarding recommended revisions to the Fair Labor Standards Act to give relief to public employers from some of the more onerous burdens imposed by the Garcia decision. While the information enclosed may be more extensive than you wish, you may find it helpful to review it all and then edit it as appropriate. Should you have any questions in regard to the enclosed, please feel free to contact me.

Very truly yours,

SEYFARTH, SHAW, FAIRWEATHER & GERALDSON

By


Fay Hartog-Rapp

FHR:cm

Enclosure

cc: Members of the Local Government
Section Council of the Illinois
State Bar Association

M E M O R A N D U M

RE: Recommended Revisions To The Fair Labor
Standards Act Or Wage And Hour Regulations
Concerning Application Of The Act to Public Employers

I. Application To School Districts

One of the areas which will have the most critical effects on public employers is that in of school districts. School districts typically employ their noncertified (nonexempt) personnel to perform extra duty assignments in extracurricular programs. Typically, security people might coach athletic events; clerical employees may supervise debate teams; and paraprofessionals of all types might sponsor and supervise such extracurricular activities as drama and music events. Since these employees would be subject to the provisions of the Fair Labor Standards Act, all of the time which they spend in their extracurricular assignments would be "hours worked" for purposes of determining compensation for overtime. The reason that the application of the FLSA would be so devastating is because it is common practice to have such extracurricular duties paid pursuant to a pre-agreed "stipend" which may be set by the teacher's collective bargaining agreement, by other collective bargaining agreements or school board policy.

While school districts may attempt to staff their extracurricular assignments with their professional personnel to avoid the application of the Fair Labor Standards Act overtime provisions, this result may create a staffing nightmare for school districts as well as a bona fide shortage of willing employees to perform such duties.

School district bus drivers or other nonexempt personnel may frequently serve as ticket takers at extracurricular athletic events. Their pay for such services has typically been agreed to pursuant to a collective bargaining agreement or school board policy which sets a per event payment for such services. The effect of applying the overtime provisions to such an arrangement would be to effectively allow the nonexempt personnel of the district to be paid more for such services than a teacher (exempt personnel) would be paid for comparable services. Such a result would inevitably create disharmony among school district employees.

The "bottom line" is that the extra duty stipends have always been viewed as a "bonus" for work voluntarily performed outside of the employee's regular duties. To subject school districts to the overtime provisions in this particular aspect will either deprive school employees of this previously awarded "bonus" or create a financial

catastrophe for the currently over-stressed school districts' budgets.

If relief is to be given in this area, it is imperative that at the very least the Fair Labor Standards Act recognizes previously negotiated collective bargaining agreements which allow for agreed-to stipends in lieu of hourly wages for extra duty compensation.

II. Compensatory Time Off

Public employers should be able to utilize compensatory time off in lieu of straight time or overtime provided that the compensatory time is utilized by the employee within one year of when it is accrued. Many public employees prefer to receive compensatory time off rather than overtime in cash. This is particularly true of police officers and detectives who may work 24 hours or more to solve a case. If the FLSA is intended to protect employees, then compensatory time should at least be offered as an option to such employees. Unlike the private sector, emergencies are the public sector's "stock in trade." Snow removal and sanitation workers regularly work to relieve municipal emergencies. The Wage and Hour Division's restrictions concerning the use of compensatory time appear overly paternalistic.

The ability to use compensatory time can be particularly important in areas where employees work unusually long work hours due to emergencies such as of forest fires. The recent fires in the Western States have required the emergency use of 15,000-17,000 firefighters from all over the country. Even the use of 28 day cycles will not help Even the use of (28) day cycles will not help agencies engaged in fighting forest fires that much this year due to the fact that the state of emergency has lasted for such a long period of time.

III. Sleep Time

Currently the Wage and Hour Division has a different rule with respect to the exclusion of sleep time for persons covered by the Section 7(k) exemption (law enforcement and fire protection personnel.) The general rule is that for shifts of 24 hours and longer sleep time of up to 8 hours can be excluded from hours worked by agreement with the employee provided the employee gets at least 5 hours uninterrupted sleep time. The Wage and Hour Division requires that the shift be in excess of 24 hours for 7(k) personnel. This difference finds absolutely no support in the congressional history of Section 7(k) or the 1974 Amendments to the Act.

A legitimate question can also be raised as to whether public employers should be required to get the agreement of

their employees to exclude uninterrupted sleep time. While the employees are not totally free during this period of time they are able to do whatever they please including sleep. Thus the amount of inconvenience is relatively minor when measured with the public body's duty to have personnel available during evening periods of time. It would seem that there would be sufficient safeguards if the public employer were permitted to exclude sleep time for shifts of 24 hours or more either by agreement or by ordinance or regulation.

Relaxation of sleep time rules for fire departments could substantially reduce the cost impact of application of the Act to such personnel without significantly reducing the benefit of coverage to such employees. In addition, there is no justification to exempting University fire and police from the Sec. 7(k) exemption since such employees perform the same services as do fire protection and police employees of units of local government.

IV. Meal Periods

The Department's position that meal periods can only be excluded by agreement for shifts in excess of 24 hours contains the same problem as the sleep time restriction. Namely, there is no reason or support for varying from the 24 hour standard used for other employees. Once again the

necessity of requiring an employee agreement in the public sector is subject to question. This is particularly true given the general rule that employees who receive at least half an hour for a meal and are free to do what they please do not have to have that period of time counted as hours worked notwithstanding the fact that they are confined to the employer's location. As long as the individual is relatively free during the meal period there is absolutely no reason for applying a different standard to fire and police personnel than is applicable to all other employees.

V. Definition of Law Enforcement
And Fire Protection Personnel

Currently the definition of these personnel excludes radio operators. This exclusion appears improper because in many areas radio operators work the same shifts as fire fighters or police officers and are an integral part of the law enforcement or fire protection function. Such individuals are not mere civilian personnel. Thus the definition of law enforcement and fire protection personnel should include radio operators or dispatchers.

VI. Detectives

Due to the extremely variable nature of the hours worked by detectives and the difficulty of accurately recording those hours detectives should be regarded as administrative personnel either by regulation or by statute. Given the fact that outside salesmen are specifically exempted from overtime coverage due to difficulties in keeping track of their hours, there appears to be no reason why detectives and other investigative personnel should not be similarly excluded.

Mr. PORTER. One of the areas which will have the most critical effect on public employers is in school districts. School districts, typically employ their noncertified—nonexempt personnel—to perform extra duty assignments in extracurricular programs. For example, security people might coach athletic events, clerical employees may supervise debate teams, and paraprofessionals of all types might supervise such extracurricular activities as drama and music events.

Since these employees will now be subject to the provisions of the FLSA, all of the time which they spend in their extracurricular assignments would be hours worked for purposes of determining compensation for overtime.

The reason that the application of the FLSA would be so devastating is because it is common practice to have such extracurricular duties paid now, pursuant to a pre-agreed stipend which would be set by the teacher's collective-bargaining agreement and by other collective-bargaining agreements or school policy.

While school districts may attempt to staff their extracurricular assignments with their professional personnel to avoid application of the FLSA overtime provisions, this result may create a staffing nightmare for school districts as well as a bona fide shortages of willing employees to perform such duties.

School district bus drivers or other nonexempt personnel may also frequently serve as ticket takers at school athletic events. Their pay for such services has typically been agreed to, pursuant to a collective-bargaining agreement or school board policy which sets a per-event payment for such services. The effect of applying the overtime provisions to such an arrangement would be effectively to allow the nonexempt personnel of the district to be paid more for such services than a teacher—who's exempt—would be paid for comparable services. Such a result would inevitably create disharmony among school district employees.

The bottom line is that the extra duty stipends have always been viewed as a bonus for work voluntarily performed outside of the employee's regular duties. To subject school districts to the overtime provisions in this particular aspect will either deprive school employees of this previously awarded bonus or create a financial catastrophe for Illinois and the Nation's overstressed school district budgets.

On compensatory time off, I've been told by the people in my municipalities that public employers should be able to utilize compensatory time off in lieu of straight time or overtime, provided that the compensatory time is utilized by the employee within one year of when it is accrued.

Many public employees prefer to receive compensatory time rather than overtime in cash. This is particularly true of police officers, detectives—as we have discussed—who may work 24 hours or more to solve a case. Firefighters would also fall into this category. If the FLSA is intended to protect employees, then compensatory time should at least be offered as an option to such employees.

Unlike the private sector, emergencies are the public sector's stock in trade. Snow removal and sanitation workers regularly work to relieve municipal emergencies.

The ability to use compensatory time can be particularly important in areas where employees work unusually long work hours due to emergencies, such as forest fires. The recent fires in the Western States have required the emergency use of 15,000 to 17,000 firefighters from all over the country. Even the use of 28-day cycles will not help firefighting agencies that much this year, due to the fact that the state of emergency has lasted for such a long period of time. Should we be paying firefighters overtime pay in fighting these emergencies? It seems to me that's the result under the Court's decision.

Mr. Chairman, I think there is a number of areas, and I have highlighted some of them, where the effect is either ridiculous or terribly burdensome upon State and local governments. I would urge your subcommittee to bring forward, as quickly as possible, the legislation to make corrections. We will certainly try to help in the House of Representatives to bring a bill quickly before the President for his signature.

[The prepared statement of Mr. Porter follows:]

COVERAGE OF STATE AND LOCAL EMPLOYEES UNDER
THE FAIR LABOR STANDARDS ACT

TESTIMONY OF:
JOHN E. PORTER
MEMBER OF CONGRESS

PRESENTED TO:
LABOR SUBCOMMITTEE
LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
JULY 25, 1985

Mr. Chairman, thank you for the opportunity to testify before your committee.

Today you will hear from a succession of state and local officials and their representatives about the devastating impact the decision of the Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority et al. (SAMTA) will have relating to application of the Fair Labor Standards Act (FLSA) to State and Local government employees. As you are aware, the decision held that it was constitutional to extend coverage of the FLSA-- the federal minimum wage and overtime law-- to essentially all state and local government jobs.

It reversed a 1976 decision, National League of Cities vs. Usery, in which the court had held that the Act could not constitutionally be applied to state and local government employees engaged in "traditional" government functions. I have been advised by the Department of Labor that it has delayed scheduling of all state and local government investigations to assure implementation of this decision under the FLSA until October 15, 1985 to allow local government bodies to adjust their compensation systems to meet the requirements of the act. However, the Department has also announced that compliance and liability under the Act will be effective from April 15, 1985.

Mr. Chairman, not only will the requirements of the Act be unnecessarily burdensome and confusing for already overburdened state

and local government officials, but in many cases they will be in direct conflict with current agreements between employees and local governments. As I indicated, before the Garcia decision the provisions of the FLSA did not apply to state and local government employees engaged in "traditional government functions." These employees were able to bargain or contract with their local municipalities for overtime and/or compensatory time off packages. As a result of this decision, agreements that are contrary to the FLSA will have to be revised.

The Court's decision will have the affect of burdening state and local officials with added costs and paperwork while they are attempting to deal with reductions in Federal aid resulting from Congress's deficit reduction measures. The extension of the Act to local governments will only aggravate budgets that are already razor thin. It will add little value to local government services, yet will end up costing the taxpayers substantially more.

Worse, it may cost jobs as municipalities are forced to shift additional resources towards those who are already among the best compensated. Early reports estimate overall costs of \$2 billion to \$4 billion for state and local governments from this ruling which will force payment of overtime wages to workers. The option of providing compensatory time off for overtime work will be lost.

I would like to provide the Committee with some examples of how this ruling will impact our state and local governments in Illinois:

School Districts

One of the areas which will have the most critical effect on public employers is in school districts. School districts typically employ their noncertified (nonexempt) personnel to perform extra duty assignments in extracurricular programs. For example, security people might coach athletic events; clerical employees may supervise debate teams; and paraprofessionals of all types might supervise such extracurricular activities as drama and music events.

Since these employees will now be subject to the provisions of the FLSA, all of the time which they spend in their extracurricular assignments would be "hours worked" for purposes of determining compensation for overtime. The reason that the application of the FLSA would be so devastating is because it is common practice to have such extracurricular duties paid pursuant to a pre-agreed "stipend" which may be set by the teacher's collective bargaining agreement, by other collective bargaining agreements or school policy.

While school districts may attempt to staff their extracurricular assignments with their professional personnel to avoid application of the FLSA overtime provisions, this result may create a staffing nightmare for school districts as well as a bona fide shortage of willing employees to perform such duties.

School district bus drivers or other nonexempt personnel may also frequently serve as ticket takers at school athletic events. Their pay for such services has typically been agreed to pursuant to a collective bargaining agreement or school board policy which sets a per event payment for such services. The effect of applying the overtime provisions to such an arrangement would be effectively to allow the nonexempt personnel of the district to be paid more for such services than a teacher (exempt personnel) would be paid for comparable services. Such a result would inevitably create disharmony among school district employees.

The "bottom line" is that the extra duty stipends have always been viewed as a "bonus" for work voluntarily performed outside of the employee's regular duties. To subject school districts to the overtime provisions in this particular aspect will either deprive school employees of this previously awarded "bonus" or create a financial catastrophe for Illinois' and the nation's over-stressed school district budgets.

Mr. Chairman, if relief is to be given in this area, it is imperative that, at the very least, the FLSA recognize previously negotiated collective bargaining agreements which allow for agreed-to stipends in lieu of hourly wages for extra duty compensation.

Compensatory Time Off

Public employers should be able to utilize compensatory time off in lieu of straight time or overtime provided that the compensatory time is utilized by the employee within one year of when it is accrued. Many public employees prefer to receive compensatory time off rather than overtime in cash. This is particularly true of police officers and detectives who may work 24 hours or more to solve a case. Firefighters also fall into this category. If the FLSA is intended to protect employees, then compensatory time should at least be offered as an option to such employees.

Unlike the private sector, emergencies are the public sector's "stock in trade." Snow removal and sanitation workers regularly work to relieve municipal emergencies. The Wage and Hour Division's restrictions concerning the use of compensatory time appear overly paternalistic.

The ability to use compensatory time can be particularly important in areas where employees work unusually long work hours due to emergencies such as forest fires. The recent fires in the Western States have required the emergency use of 15,000-17,000 firefighters from all over the country. Even the use of 28 day cycles will not help fire-fighting agencies that much this year due to the fact that the state of emergency has lasted for such a long period of time.

Definition of Law Enforcement and Fire Protection Personnel

Currently the definition of these personnel excludes radio operators. This exclusion appears improper because in many areas radio operators work the same shifts as fire fighters or police officers and are an integral part of the law enforcement or fire civilian personnel. Thus the definition of law enforcement and fire protection personnel should include radio operators or dispatchers.

Detectives

Due to the extremely variable nature of the hours worked by detectives and the difficulty of accurately recording those hours, detectives should be regarded as administrative personnel either by regulation or by statute. Given the fact that outside salesman are specifically exempted from overtime coverage due to difficulties in keeping track of their hours, there appears to be no reason why detectives and other investigative personnel should not be similarly excluded.

Mr. Chairman, I believe it is very obvious that this decision needs prompt corrective action by the Congress. You will hear from many witnesses who can provide the details of what specific changes need to be made to provide relief to local governmental bodies who should not be burdened by more Federal regulations where they are not absolutely necessary.

The result of the Court's ruling is a threat to state sovereignty and local authority. The group which will ultimately suffer most is our

constituents for whom local governments are providing services. If this decision is not corrected by legislation, the end result will be cuts in delivery of fire and police protection and emergency medical services.

Legislation has been introduced in both the House and the Senate to provide relief to state and local governments from this decision. I urge your Committee to move forward necessary legislation to rectify this situation as soon as possible. I will be working with my colleagues in the House to do likewise. I will be happy to respond to any questions the members of the Committee may have.

Senator NICKLES. Thank you very much, Congressman Porter.

Senator Wilson, you mentioned that you had hearings on this issue. You also mentioned, I believe, that you heard statements from several employees who basically said they wanted to have the right, or have that option to have the compensatory time in lieu of the overtime. Is that correct?

Senator WILSON. That is correct, Mr. Chairman. And as a matter of fact, the reference I made in my testimony to the homicide detective was Mr. Olson, who Congressman Porter identified in the Wall Street Journal's editorial on that subject. He was most eloquent, and I think his testimony would be of great benefit to your subcommittee because he said precisely that, the work, by its nature, requires overtime; the work, by its nature, is so stressful that those who are engaged in it very much want the option of taking comp time instead of cash.

Senator NICKLES. Congressman Porter mentioned there might be loss of jobs. You were mayor of San Diego and were involved, I'm assuming, in negotiations with different public employees—firefighters, police, and city employees, as well.

Senator WILSON. That's correct.

Senator NICKLES. In your negotiations, if you were mandated strictly to have overtime alone, and any time anybody worked over 40 hours, or whatever category, had to pay or was mandated to pay that overtime, and you could only spend so much money, do you think a typical mayor would have to reduce the number of employees to still get within the budget figures?

Senator WILSON. Absolutely, Mr. Chairman; and that's what I meant when I said that in those jurisdictions that do have a revenue limitation, there is not the option to increase taxes; your option is simply to slice that fixed pie differently. And inevitably, because police and fire service, the safety functions, are going to claim priority, what it means is that as you are required to budget more and more money for those functions, there is less of that pie left for other things. So you will not only cut down on the other services that are competing with public safety for their share of the

pie, it's also true that as the wages go up, as they are mandated to go up, because of time and a half in cash—in cash rather than compensatory time off—you are likely to see the consequence that Congressman Porter referred to, which is that you will have fewer more highly compensated employees, but fewer of them.

And once again, the net result to the general tax-paying public is that for the same amount of tax dollars they are getting less in the way of service.

Senator NICKLES. Congressman Porter, do you have very much support in the House for doing something to overturn *Garcia*?

Mr. PORTER. Mr. Chairman, I can't say that I know the answer to that question, but I think that when the facts come out in the hearings that you are conducting here about the effect throughout the country on State and local governments and what it's going to cost, then I think that support will build in the House very quickly.

Senator NICKLES. I hope that's the case. Many people have asked me to estimate the schedule for moving this legislation forward. I would like to move it forward very quickly. In order to do that, groups and individuals are going to have to contact their Congressmen and Senators and let them know what the impact would be before we will be successful in moving the legislation. I appreciate your interest and leadership in this, as well.

Senator Wallop, do you have any questions or comments?

Senator WALLOP. No, Mr Chairman, but I have an observation. Both Congressman Porter and Senator Wilson, and others coming down, will testify that the two sets of interests in passing this legislation—not only is there the State and local government employer's interest, which is real as they seek to serve the people, but there is employees' interests, and it seems so terribly arrogant of us to select out, in Congress, that which is a suitable work week, or work day, when people have come to agreements that make them actually seek the jobs for that purpose.

All over America, people's work habits are changing; employers are trying to seek to accommodate family needs and other things of their employees, and find themselves blocked by this piece of legislation which had its purpose at a time, but it doesn't reflect today in America. It doesn't reflect what people want to have out of their life today in America, employees; and if they can bargain happily with their employer to achieve certain working patterns, that ought to be, in this country, their privilege. And I hope that we have our view on both sides of this—not only the civic, municipal, and State employers, but those of the employees who really do want these kinds of work arrangements.

Senator WILSON. Mr. Chairman, if I may pick up on Senator Wallop's comment—he is absolutely right. We are not here simply protesting on behalf of the municipal managers, but on behalf of their employees, because such innovations as flextime were introduced not simply to gain managerial flexibility, but to gain flexibility for the employees.

And if those innovations are denied by this decision, as we believe them to be, we're not doing anything very good for anyone—not for the taxpayers receiving the services, or for the employees who have chosen that kind of employment. And Senator Wallop is right on the money—again and again, I think you will find that

employees want the option of compensatory time off because, in many cases, the time is more valuable to them even than the cash.

If we are going to go back to a time that he quite rightly observes no longer exists, then I would say, "What is the record of inequities on the part of State and local governments?"

This legislation is to try to correct a decision that was reached in *Garcia*. No question that the plaintiff in that instance wanted the cash. Well, that's fine; but let the employees bargain for the cash, and what they will conclude is that there is only so much cash and that, ultimately, what this is going to do is result in less service, less flexibility for the employees, as well as less flexibility for the managers, and result in overstepping by Congress of a constitutional bound that we should be very careful to observe.

Senator NICKLES. I appreciate your comments; and I also echo the comments of Senators Wallop, Thurmond, and yourself concerning the 10th amendment. I think it is an abused amendment that many times the Congress and the courts really ignore. As a result, we see a real erosion of power from the States and the people into Federal hands.

Thank you both very much.

Senator WILSON. Thank you, sir.

Senator NICKLES. Our next distinguished panelist are Gov. John Ashcroft from Jefferson City, MO; Gov. Richard Lamm from Denver, CO; Gov. James Martin from Raleigh, NC; and Lt. Gov. William Hobby from Austin, TX.

Governor Ashcroft, we appreciate your coming and your interest in this legislation.

For all of our panelists, we will enter your statements in the record in full. I would like to enter prior to this panel the testimony of Representative Michael DeWine into the record, as well.

Please proceed.

[The prepared statement of Mr. DeWine follows:]

MIKE DeWINE

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July 24, 1985

Honorable Donald L. Nickles
Labor and Human Resources Committee
Labor Subcommittee
Washington D.C., 20515

Dear Senator Nickles:

Earlier this year, the United States Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority, overruled its decision of nine years in National League of Cities v. Usery. The Court held that no constitutional limitation exists on the application of the Fair Labor Standards Act (FLSA) to employees of state and local governments. The Garcia decision potentially subjects state and local governments to the federal overtime laws.

I have enclosed written testimony in support of exempting local governments from the provisions of the FLSA. I ask that it be included in the record.

Very respectfully yours,

MIKE DeWINE
Member of Congress
Ohio 7th District

MD:re

Enclosure

Testimony of Representative Michael DeWine before the Senate
Subcommittee on Labor

Mr. Chairman, I appreciate the opportunity to present my testimony regarding the impact of the recent United States Supreme Court decision, Garcia v. San Antonio Metropolitan Transit Authority, which placed state and local governments under the jurisdiction of the Fair Labor Standards Act (FLSA).

Since April of this year the common practice of granting compensatory time to firefighters and policemen for overtime worked has been eliminated. The impact on the budgets of large and small communities alike will be drastic as they do not have the available resources to offset these costs. While the Department of Labor will not begin its enforcement of this decision until October, local governments not in compliance are vulnerable to individual law suits.

In the past the practice of granting firemen and policemen compensatory time was satisfactory to everyone involved. It allowed local governments to compensate their employees for long hours worked by giving them time off. At the same time, the employees used the time off to get away from the high level of occupational stress associated with firefighting and police work. Now, based on a very broad interpretation of the Supreme Court decision, local governments will incur substantially higher expenses and municipal employees will be forced to face additional stress.

A recent article in the Wall Street Journal estimated that Labor Department enforcement of the Garcia decision will cost local governments in excess of three billion dollars or more. Los Angeles will pay \$100 million dollars more per year, San Francisco \$50 million, and New York \$40 million according to the National League of Cities. This devastating effect will not be felt by large cities alone. It will cost Greene County, Ohio \$75,000 per year, Urbana, Ohio \$30,000 per year, force St. Paris, Ohio to drastically curtail fire fighting services, and probably force the Xenia, Ohio library to close on week ends. Public employees living in rural areas who accrued compensatory time during the winter so they could plant their farms in the spring will be unable to do so. Police officers who accrued compensatory time to work part time as security guards will lose this source of additional income. Simply put, everyone loses. Local governments will be faced with layoffs, reducing services, or increasing taxes. Employees will lose a benefit they have had for years.

In conclusion, I can best sum up local governments' feeling on this issue by offering an excerpt from a letter written by the administrator of the Greene County District Library: "The recent Supreme Court decision reinterpreting coverage of the Fair Labor Standards Act to state and local government employees was not received well at our last board meeting. The feeling expressed was one of resentment towards federal encroachment into the area of local government. At a time when state and local governments are under an increasing financial burden and are being asked to assume a greater responsibility in all areas, it seems decisions and legislative meddling as exemplified in this recent decision are counterproductive."

I support efforts to exempt local governments from the provisions of the Fair Labor Standards Act and hope that your subcommittee can initiate legislation to do the same. Again, thank you for this opportunity to testify.

STATEMENT OF HON. JOHN D. ASHCROFT, GOVERNOR OF THE STATE OF MISSOURI; HON. RICHARD D. LAMM, GOVERNOR OF THE STATE OF COLORADO; HON. JAMES G. MARTIN, GOVERNOR OF THE STATE OF NORTH CAROLINA; AND HON. WILLIAM P. HOBBY, LIEUTENANT GOVERNOR OF THE STATE OF TEXAS

Governor ASHCROFT. Thank you, Mr. Chairman.

Let me say just how encouraging it is to know that we have legislation that has been proposed already containing what are apparently components of adjustment which would have a real therapeutic impact on the ability of States and local governments to provide the services that our people demand.

I can speak only as Governor of Missouri, but the problems unleashed by the *Garcia* decision are far reaching and they are widely shared.

When the Supreme Court decided in 1976, in the *League of Cities* case that the Fair Labor Standards Act could not be applied to traditional governmental functions of State and local governments, it embraced some important governmental concepts that are no less valid today than they were in 1976.

Foremost among those concepts is that State and local governments are qualitatively different in structure and in function from private business. The Government provides vital societal services, but it does so only because the people have directed it to do so, through their political process.

Government can provide these services only through people, and those are the people who are the firemen, the policemen, the prison guards, the social workers, child abuse investigators, disaster-response personnel—these people and others serve under exceptional circumstances, at the request of citizens of their States and localities.

The first thing I would like to say is that State and local governmental employees understand the mandate of service, and they work because they want to be a part of that service, as well as for the monetary return. They get a satisfaction and a sense of self-worth that comes from the opportunity to serve, without being unduly restrained or hamstrung by a series of governmentally imposed rigid requirements.

Perhaps the most significant characteristic of the unique opportunity of public service is the protection that public servants enjoy because they work in government. These employees hold the right of redress of abuses through the electoral and political process which simply is not available to employees with private firms.

State employees, each and every one of them, are shareholders entitled to participate in the election of their corporate officers, the legislators and the Governor.

Government employees are a part of the process: they help to direct the process, they help fashion and shape the conditions under which, and the benefits for which, they work.

The uniformity of employment conditions, nationwide, is important and is one of the important reasons for the Fair Labor Standards Act. It helps regulate the ability of States to compete with each other in attracting business. However, it is unnecessary to regulate the ability of States to compete with each other for the

achievement of governmental functions. It is pretty clear to me that government does not compete for the right to govern; it has a fixed and limited jurisdiction. Nothing that my State can do, even apart from the Fair Labor Standards Act, would encourage other governments to locate or do their governmental business in my State. We don't need to guard against our tailoring employment conditions which would make our State an attractive place for governments, that would induce others to come—they won't; we don't want them.

So uniformity among States, an important consideration in the private sector to protect the ability of all States to play on an even field to attract industry, is simply not a concept that is important in government. And so the Fair Labor Standards Act's ambition to enforce uniformity in that respect, to provide that level-playing field, simply has no application to State government.

The general employment conditions of State employees are not a proper concern for the Congress, and are not subject to Congress' interstate commerce authority. Rather, in my judgment, they are properly left to the elected legislatures of the States themselves.

State governments face a wide variety of challenges and demands, and I believe it's essential to our proper functioning that State-elected officials retain the capacity to meet the challenges, and it's important that States have the freedom to experiment as the "laboratories of democracy" that Justice Brandeis called for in 1932, six years before Congress ever passed the Fair Labor Standards Act.

In short, there is a fundamental contrast between private employers and public employers, and it's very clear that public employers are required by both the State and the Federal Constitution to serve their citizens through the political process, which the people have put in place. Not only is it entirely fitting for Congress to exempt State and local governments from the Fair Labor Standards Act, it is mandated by the principles of sovereignty, comity, and federalism.

Indeed, to deny exemption, Congress will have to retreat from a policy, a policy of decisions it has made when it exempted State governments from the National Labor Relations Act, from the Labor Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Insurance Security Act, the Sherman Act, and the Federal Power Act.

Application of the act, the Fair Labor Standards Act, not only strikes at principles of federalism, but its imposition would have serious taxable consequences for the State.

The basic problem is that the act will raise the cost of government, without yielding clear, offsetting benefits for public or for government employees.

We estimate, for example, that implementing *Garcia* will cost the Missouri State government, that is the Missouri State taxpayers, well over \$8 million every year in mandated expenditures for employee overtime alone. These costs will affect our budget this year—and that's the same year in which I personally had to veto over \$50 million in appropriations just to keep our State budget in balance.

There will be added costs, other costs—to employ the additional personnel whose job it will be to limit overtime payments, to implement new personnel procedures, to expand the recordkeeping required by the act, and to defray bureaucratic overhead, mandated by the act itself. Litigation and related awards would add still further to the governmental burden and to costs which would ultimately be borne by Missouri taxpayers by way of increased costs or reduced services.

Nor is it clear that the act would benefit public employees. The State of Missouri has 153,000 public employees; about 72,000 of them serve in State government. Now, our State government employment practices already meet the spirit of the Fair Labor Standards Act and, in fact, we surpass many of the act's requirements.

For example, the minimum salary payable to a Missouri State Merit System employee has exceeded the Federal minimum wage for at least the past 20 years. In 1966 our minimum wage was 24 percent above the Federal minimum; today, the minimum wage paid to Missouri workers exceeds the Federal minimum by 30.7 percent. Similarly, we recognize and reward overtime in a systematic and a fair manner.

Policy, established by our elected general assembly and implemented through a professional State personnel system, serves the twin goals of effective government and fairness to State employees. It's a policy that's fashioned in the employment arena by State employees to meet their objectives and their aspirations. They fashioned the policy in conjunction with the State.

The application of the Fair Labor Standards Act to the states will simply substitute congressional judgment for State judgment in an area of fundamental State responsibility. It places form over substance by mandating a bureaucratic, burdensome procedure to impose an awkward, unacceptable scheme of work rules on people who would prefer to have the ability to fashion those conditions themselves.

Let me now focus on the most grievous burden which would follow imposition of the act upon the States. The State of Missouri has decided that about 60 percent of our State employees would be eligible for compensatory time. This policy consideration would be reversed by the act. This abrogation of our policies will have the counterproductive effect of increasing State payroll costs while, simultaneously, making state jobs less attractive. One of the major challenges of State government is attracting good people into the public arena, to serve the people of our States; and to take away some of the attractiveness is simply counterproductive and unwise.

Unless Congress exempts the States from the Fair Labor Standards overtime provision, Missouri personnel administrators expect higher employee turnover and greater difficulty in attracting top-quality applicants to State service.

Another aspect of the act's overtime provision is the potentially high cost if the Department of Labor is allowed to consider each State government as a single employer.

The act currently shields a private sector employer from overtime liability for a full-time employee who works a second job. In the case of a State employee, who holds two different positions with two different State agencies, however, the Department of

Labor has announced its intention to treat any time beyond the base 40 hours as overtime, payable at a premium rate.

The single-employer rule would thwart the desire of many industrious employees to earn a supplemental income through a second job.

If State government is considered a single employer, it would have an obvious financial incentive to prevent such dual employment, and that's what the act would require. The Missouri State Personnel Agency estimates that about 2,000 State employees could lose their second supplemental jobs with the State for this reason.

Still another overtime-related problem is the excessively low number of hours which the Federal law permits fire fighting and law enforcement individuals to work. For example, converting the Missouri State Highway Patrol to the dramatically reduced number of authorized hours would create a serious financial strain. More importantly, however, in the past, our highway patrolmen have taken it upon themselves to volunteer—volunteer, in the true sense of the word—in communities where they live. They do this as State law enforcement officers, to protect their homes, their friends, and their neighbors. Not only would the act's overtime restriction prohibit a highway patrolman from serving his community in this way, in fact, it would force the State to reprimand him, or her, from volunteering at all.

Furthermore, investigations of criminal activities aren't conformable, and we already know this as a result of your excellent contribution of the article in the Post—they are not conformable to arbitrary hours and the limitations imposed by the act.

Application of the act's provisions to the patrolmen of Missouri would require the patrol to pull officers prematurely from their important investigations so that they may brief their shift relief.

Let me emphasize that the Missouri Highway Patrol is an extremely professional operation, one of which I am most proud. Individuals are highway patrolmen, not because they want to earn a lot of money, necessarily, but because they understand and believe that they can provide a public service in their communities. They want to provide service not only to the State but to their neighbors by being patrolmen. This act would place arbitrary and literally silly limits on the availability and ability of these patrolmen to do the job they want to do.

Incidentally, we have about 50 openings in the patrol now, and several thousand individuals have applied. They applied during the time when they believed they would be allowed to and asked to participate as aggressive public servants, capable of rendering service as volunteers.

I submit that labor standards, as they apply to State and local governments, should stand on these principles. First, government must work efficiently and effectively for public good. Second, public employees must be treated in a just and equitable manner; and, third, that there is an inherent distinction that exists between State and local governments and private business, with regard to the vital public functions State and local governments provide and the constraints and opportunities under which they operate.

I believe that congressional action is needed to ensure that we observe these principles. The problems I outlined are serious, and

they need your considered attention. I recommend exemption for State and local governments from the overtime provisions of the Fair Labor Standards Act.

As Governor of the State of Missouri, I pledge our good will and hard work toward a government that works for the public good and toward fair treatment for public employees.

We are here, at your invitation, to take part in the political process which the Supreme Court invited, a process that should ensure that laws which unduly burden the States will not be promulgated or maintained. The Fair Labor Standards Act, in its application, provided for in the *Garcia* case, unduly burdens State and local governments, to the disadvantage of the citizens of our States and to those who are employed by State and local governments. And it is a fortunate fact, indeed, that you are considering relieving the States of that burden.

[The prepared statement of Governor Ashcroft follows:]

TESTIMONY

on

IMPACT OF THE GARCIA RULING ON
MISSOURI STATE GOVERNMENT

by

JOHN ASHCROFT, GOVERNOR
STATE OF MISSOURI

July 25, 1985

Mr. Chairman and distinguished members of the subcommittee, I appreciate this opportunity to address the recent Garcia decision. The Court's ruling in this case raises major issues for state and local governments across the United States. I can speak only as Governor of Missouri, of course, but the problems unleashed by Garcia are far-reaching and widely shared.

Much has been written -- and much more no doubt will be written -- on the Court's reasoning and application of constitutional principals to this case. I believe that the Court had valid grounds for the 1976 National League of Cities decision which Garcia has overturned. Those concerns hinge on the uniqueness of state and local government functions and their justified exclusion from the Fair Labor Standards Act.

State and local government employees provide vital, publicly-mandated services, often under exceptional conditions, on behalf of the citizens of their states and localities. Public service attracts the best and brightest among professionals and volunteers alike whose dedication exemplifies government's unique "mandate of service". A key distinction is that state governments do not compete with each other or with the private sector. The electorate give state and local governments exclusive authority in areas of economic and social life which the private sector is not equipped to serve.

State and local government workers also are set off from their private-sector colleagues by the protection they enjoy through the governmental process itself. Government employees hold a right of redress through the electoral process which is not available to employees of private firms.

Uniformity of employment conditions was a propelling force for adoption of the Fair Labor Standards Act in 1938. The employment conditions of state government employees, however, are a proper concern of the elected legislatures of the states themselves, not of Congress. State governments face a wide variety of challenges and popular demands. It is essential that their elected officials retain the capacity to meet those challenges and that states have freedom to experiment as the "laboratories of democracy" that Justice Brandeis endorsed in 1932, six years before Congress passed the Fair Labor Standards Act.

State and local governments are mandated by our federal constitution to serve their citizens through the political process established by the

citizens themselves. It is entirely fitting for Congress to exempt state and local governments from onerous provisions of the Fair Labor Standards Act. Indeed, to deny such exemption Congress would have to break with the precedents for exclusion it already has set in the National Labor Relations Act, the Labor Management Reporting and Disclosure Act, the Occupational Safety and Health Act, the Employee Retirement Insurance Security Act, the Sherman Act and the Federal Power Act. There is little question that the majority opinion in Garcia, which specifically cites those precedents, invites Congress to take this important step.

The employment practices of Missouri and our sister state governments substantially address and even exceed objectives enunciated by Congress through the Fair Labor Standards Act.

The minimum salary which can be paid to Missouri State Merit System employees, for example, has exceeded the federal minimum wage for at least the past twenty years. In 1966, our minimum state employee wage was 24 percent above the federal minimum. Today, in 1985, the minimum Missouri state wage exceeds the federal minimum wage of \$3.35 per hour by 30.7 percent.

Our state overtime policy is at least as generous as that of the Fair Labor Standards act and is tailored to fit the specific service delivery mandates of individual state agencies.

Certain limited categories of State government employees were brought within Fair Labor Standards Act coverage as early as 1966 and all

state employees were covered within the 1974 amendments to the Act. The National League of Cities ruling removed them from coverage. Missouri state personnel rules, however, have met the objectives of the Fair Labor Standards Act throughout the period starting 1966. Overtime work by Missouri state employees is recorded systematically and is returned as compensatory time off or in cash payment. Overtime compensation in both forms is computed at the one and one-half premium rate for covered employees. In addition, Missouri goes beyond Fair Labor Standards Act requirements by granting overtime compensation at a straight-time rate to employees in lower-paid levels of the group which the Fair Labor Standards Act exempts from mandatory coverage.

Imposition of the Fair Labor Standards Act over-time requirements thus would disrupt well-founded labor practices which Missouri and her sister states have adopted and would simply substitute Congressional judgement for state judgement in an area of fundamental state responsibility.

Let me focus now on specific burdens which would follow imposition of the Fair Labor Standards Act on the states. Two problems stand out as most severe: the Fair Labor Standards Act treatment of overtime and the potential for undeserved legal liability.

The Fair Labor Standards Act would eliminate our ability to offer compensatory time to employees who work overtime. Approximately sixty percent of our 72,500 state government workers are eligible for compensatory time at the one and one-half rate. We estimate that reversal of that existing state policy alone could cost Missouri state

government--that is, Missouri state taxpayers--\$8.2 million every year in mandated expenditures for employee overtime alone. These costs would begin in Fiscal Year 1986, a year in which I, as Chief Executive Officer, had to veto \$50 million in appropriations just to keep our state budget in balance. There would be added costs to employ additional personnel to limit overtime payments, to implement new personnel procedures, expand record-keeping and defray mandated bureaucratic overhead.

New spending and growing government administration are justified when they produce offsetting new benefits for our citizens. Unfortunately, the overtime provisions of Fair Labor Standards Act appear to yield no such benefits. We find that many state employees consider compensatory time an attraction to employment with the state because of the flexibility it allows in scheduling private business matters--for example, for those who also operate farms or other seasonal businesses--and family activities. Under the Fair Labor Standards Act, they would have to be compensated by payment except in a small number of cases.

The Fair Labor Standards Act allows employers to offer time off as a partial alternative to paid over-time. Time off will not significantly lighten the overtime payment burden for state and local governments, however, because the Fair Labor Standards Act mandates that time off be given strictly in the same pay period in which over-time is incurred. The Department of Labor itself notes that the time-off plan "has been rarely used because (it) is somewhat difficult to administer...".

Missouri state employees affected by the compensatory time reversal include 932 Highway Patrol, security and other public safety personnel,

1494 corrections-related officers, 5324 hospital and mental health staff, 2054 social services workers and all others except the narrowly defined executive, administrative and professional classes.

The Fair Labor Standards Act prohibition of compensatory time thus would have the counterproductive effect of increasing state payroll costs while simultaneously making state jobs less attractive. Unless Congress exempts the states from the Fair Labor Standards Act overtime provisions, Missouri's personnel administrators expect higher employee turnover and greater difficulty in attracting top-quality applicants to state service.

It is too early now to determine the number of additional personnel Missouri would have to hire to limit overtime payments. But there is little question that the cash payment mandate would force substantial additional costs on Missouri taxpayers. That looming cost would have to be met at the expense of other, higher priorities and would take a bite out of a state treasury which we have worked steadily to return to stability after the recent recessionary years.

A closely related aspect of the Fair Labor Standards Act overtime provisions is the potentially high cost if the Department of Labor is allowed to consider each state government a "single" or "joint" employer. The Fair Labor Standards Act gives a private-sector employer immunity from overtime for a full-time employee who works for a second firm as well. In the case of state employees who hold a second part-time

job with a second state agency, however, the Department of Labor intends to treat any time beyond the base forty hours as overtime payable at a premium rate.

The single employer rule would thwart the desire of many employees to earn a supplemental income through a second state job since a state government which is considered a single employer would have an obvious financial incentive to prevent such dual employment. Missouri's state personnel agency estimates that 2,000 state employees could lose their second, supplemental jobs with the state for this reason.

Yet another overtime-related problem is the excessively tight Fair Labor Standards Act cap on hours which law enforcement and fire fighting personnel may work before they begin accruing overtime. Up until April 15, 1985, for example, the Missouri Highway Patrol had adopted a standard of at least 216 hours for 28-day work periods. Converting the Patrol to the dramatically reduced standard of only 171 hours would create serious financial strains on that agency. Since the Fair Labor Standards Act broadly defines law enforcement, a similar impact would extend to the Missouri State Highway Patrol, the Division of Water Safety, the Division of Liquor Control and the Missouri Department of Corrections and Human Resources.

In addition to major burdens which would flow from imposition of Fair Labor Standards Act over-time requirements, I am very concerned that possible litigation brought pursuant to the Fair Labor Standards Act would add still further to the governmental burden and to the cost born by Missouri taxpayers.

Many anticipate that private suits will be brought for overtime earned between February 19, 1985, the date of the initial ruling, and the effective date of the legislation passed by Congress. Unless Congress allows a reasonable grace period it also appears likely that state and local governments will be liable to Department of Labor suits retroactive to April 15.

The Department of Labor must understand that state and local government decisionmaking processes are tightly constrained. The most stark example is the impossibility of enacting necessary law and appropriations when the state legislature is out of session. I understand that the Department of Labor, in earlier consultations, discussed a grace period for state and local governments. We are disappointed that the Department provided no such grace period in the "investigative policy" it issued on June 14.

Closely related are administrative difficulties and costs that immediate imposition of the Fair Labor Standards Act -- stemming from a sudden and unexpected Supreme Court ruling -- would pose for Missouri and the other state governments.

I add my voice to the requests of the National Conference of State Legislatures, Council of State Governments, League of Cities, Association of Counties, Conference of Mayors and International City Management Association for a prospective effective date for any new Fair Labor Standards Act requirements applied to the states. State personnel systems and labor standards are modern, well-administered and fair toward

employees. Bringing those systems into line with complicated requirements of the Fair Labor Standards Act will take time and much effort. The U.S. Department of Labor must appreciate the need for a period of transition.

Mr. Chairman, I submit that labor standards as they apply to state and local governments should stand on these principles:

- o Government must work efficiently and effectively for the public good.
- o Public employees must be treated in a just and equitable manner.
- o An inherent distinction exists between state and local governments and private business with regard to the vital public functions state and local governments serve and the legal constraints under which they operate.

Congressional action is needed to ensure that we observe these principles while state and local governments adjust to any newly-imposed requirements of the Fair Labor Standards Act. The problems I have outlined are serious and need attention. Let me suggest two specific actions which Congress can take:

- o First, I recommend exemption for state and local governments from the over-time provisions of the Fair Labor Standards Act.

- o Second, I urge you to establish a statutory grace period for state and local governments to come into compliance with the other complicated provisions of the Fair Labor Standards Act. Legal immunity is appropriate for state and local governments which execute a responsible plan of compliance and move to full implementation. The approach is equally justified in the case of sudden and unanticipated court action overturning practices accepted nationwide for years as in the case of new legislatively-imposed federal mandates.

Mr. Chairman, as Governor of Missouri I pledge our good will and hard work toward government that works for the public good and toward continued fair treatment for public employees. In its Garcia ruling, the Court clearly endorsed Congressional action to exempt state and local governments from the Fair Labor Standards Act or, alternatively, to guide and define the application of the Fair Labor Standards Act and other intergovernmental standards. The majority wrote:

"...the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through states participating in federal governmental action. The political process ensures that laws that unduly burden the states will not be promulgated."

We are here at your invitation to take part in that process, seeking "congressional action" to help us best serve all the people of our states. Thank you again for hearing our voices and for considering our recommendations.

Senator NICKLES. Governor Ashcroft, we appreciate your comments and participation in today's meeting.

Governor Martin from North Carolina—Governor Martin, before you proceed, I will insert a statement from Senator Helms. He would like to be here to introduce you, but he is in the process of marking up a very important and also difficult agriculture bill. I will enter his statement into the record, and we do welcome you to the committee.

[The prepared statement of Senator Helms follows:]

PREPARED STATEMENT OF SENATOR HELMS

Mr. Chairman, it is an honor to appear before you today to introduce to this committee the Honorable James G. Martin, Governor of North Carolina.

Mr. Chairman, Governor Martin is no stranger to this place. He served in Congress for twelve years before being elected Governor in 1984. He ably represented the people of North Carolina's Ninth Congressional District, which includes Charlotte, our largest city.

Governor Martin has always been sensitive to the problems of state and local governments, particularly those caused by actions of the federal government. It is appropriate, then, that he be here today to comment on the problems resulting from the Supreme Court's decision in the case *Garcia v. San Antonio Metropolitan Transit*.

In this case, the Supreme Court held that the maximum hour and minimum wage provisions of the Fair Labor Standards Act apply to state governments and their political subdivisions. In the first place, Mr. Chairman, the federal government need not tell the states how to conduct their business. In the second, if this decision is allowed to stand, it will bankrupt countless states and cities.

Mr. Chairman, I congratulate you for conducting this inquiry into the effect of this decision on our States and cities. I am confident you will find that this is a decision Congress must overturn.

I appreciate your inviting Governor Martin to testify, and I am pleased to be here to introduce him to you.

Governor MARTIN. Thank you, Senator. I also appreciate the kind remarks of Senator Thurmond earlier, and I particularly want to commend you for your leadership on this issue and for allowing us the opportunity to be here to express the serious concerns that we in North Carolina have as a result of the *Garcia* decision, which holds that public employees, engaged in the performance of traditional governmental functions, are subject to the provisions of the Fair Labor Standards Act.

Its impact upon North Carolina is twofold: First, it eliminates the flexibility our States and local governments have had to provide protection services to our citizens in an economic manner without damage to employee morale. And second, it undermines the sovereignty of individual States and, as Justice Powell stated in his dissent, "reduces the 10th amendment of our Constitution to meaningless rhetoric."

Now I will direct my remarks upon the first point. As a result of applying the Fair Labor Standards Act to State and local governments, our State government expects to incur more than \$17 million in irreducible overtime payments in the 1985-86 fiscal year.

The past practice of time off in lieu of overtime for law enforcement officers did have the dual virtues of improved productive efficiency of their work and the degree of flexibility that was highly popular among their ranks.

I would share with you that I personally did not begin to get excited and interested in this particular issue until one of them took

it upon themselves to take the initiative to explain to me the problem that it would cause for them, and they explained to me that they liked their job just as it was.

Our secretary of crime control and public safety estimates that without compensatory time off, we will need 100 additional highway patrolmen just to continue providing the services and protection at the current levels.

Highway patrolmen are frequently called upon to assist in traffic accidents involving serious injuries which require these officers to work beyond their normal hours, but we cannot get motorists to confine their wrecks to the early hours of the shift. The Fair Labor Standards Act's requirement that this time be taken off during the same pay period is just often not possible, and so the result of that is that while now they may pursue a suspect across the State line, wouldn't it be ironic if they couldn't pursue him across the time line, into the next pay shift.

Highway patrolmen also have been called upon to be involved in manhunts, such as when two of our highway patrolmen were murdered this past year, and have assisted in evacuations caused by hurricanes. The lack of flexibility for highway patrolmen to work these hours greatly impairs their ability to provide the protection that the public needs.

We also fear that surveillance details by alcohol and drug enforcement officers will be eliminated by this overtime pay requirement. Surveillance in these undercover operations often takes 15 to 16 hours a day, waiting for the break, and this work often requires a backup officer to provide protection for the undercover agent. Budget constraints and inflexibility of the Fair Labor Standards Act provisions would curtail these types of operations, or limit the use of backup personnel, thereby jeopardizing law enforcement personnel's safety and morale, as well as endanger our citizens.

Many State and local government functions are seasonal. Many of our coastal towns, for example, require law enforcement and fire fighting, along with emergency medical personnel, to work longer hours during the summer tourist months and during several pay periods, and then take time off, with pay, in the winter. The freedom allowed by this time off instead of overtime is appreciated by these employees, and its elimination would adversely affect their morale.

Under the Fair Labor Standards Act, our wild life law enforcement officers who patrol our coast to protect our environment, as well as assist in drug law enforcement, must now take time off during the same pay period. But that doesn't and can't work if the limit is reached late in a particular pay period, because it can't be carried over.

This will result in employees taking time off in the middle of the summer months, after they have accumulated all the hours they can accumulate, even though this is the height of the season and the height of the need for their services. Not only would this expose our environment to harm, but many of these employees would rather have time off in the winter for recreational purposes of their own choosing and then function in the summer months as the professionals they are. But instead, and against their own

wishes, they would be forced into the same regimentation of other jobs and the public and the environment would get less protection.

The economic impact on North Carolina's local governments is enormous and perhaps more devastating than on State government. Our largest cities, typically, are looking at another half million dollars lost. Our smaller towns, which are struggling to provide essential services, will suffer even more.

Let me give you an example: Wendell, NC, with a population of 2,386, has 23 employees and anticipates \$30,000 in additional costs during the current fiscal year because of this provision. They must either raise property taxes by 5 cents per \$100 or eliminate services.

Consider this: the Greensboro, NC, Department of Parks and Recreation has a special program that provides field trips for the mentally and physically handicapped to visit such places as our Nation's capital, to share that pride, and the cost of these trips are expected to double, thereby jeopardizing the program.

In summary, the *Garcia* decision adversely affects public employees and citizens alike. It impacts negatively upon our budgets, employee relations and the level of services provided to the public, with little apparent benefit to anyone.

I am submitting for the record, along with my testimony, a chart which provides information on retroactive costs, compliance costs, for fiscal 1985-86 and the comparative effect on current property tax rates for a sample of cities and towns in North Carolina, and commend it for your review.

In conclusion, I respectfully urge that the Congress act to correct the *Garcia* decision, not only to avoid the adverse economic impact upon State and local governments, but also to recognize the sovereignty of the States. State and local governments, and especially law enforcement, firefighting and emergency medical personnel should be exempted from the Fair Labor Standards Act.

Certainly, if Federal law enforcement and firefighters are exempt from these overtime requirements, so should the other 99 percent of our law enforcement officers and firefighters, who are State and local employees.

[The prepared statement of Governor Martin follows:]

IMPACT OF GARCIA ON NORTH CAROLINA
PRESENTED BY JAMES G. MARTIN, GOVERNOR

Testimony before the Subcommittee on Labor
of the Senate Committee on Labor and Human Resources

July 25, 1985

I appreciate the opportunity to appear before the sub-committee to express some serious concerns that we in North Carolina have resulting from the Garcia decision. Garcia v. San Antonio Metro-Transit Authority held that public employees engaged in the performance of "traditional governmental functions" would be subject to the provisions of the Fair Labor Standards Act. Its impact on North Carolina is two-fold. It will have a tremendous negative effect on the ability of our State and local community governments to provide services to our citizens in an economic manner without damage to employee morale. It also totally undermines the sovereignty of our State as well as every other state in the Union, and as stated by Justice Powell in his dissent "reduces the Tenth Amendment of our Constitution to meaningless rhetoric."

As a result of the application of the Fair Labor Standards Act to State and local governments, our State government expects to incur additional overtime payments in the fiscal year 1985-86 of over \$15,000,000. The head of our Department of Crime Control and Public Safety estimates that we will need over an additional 100 highway patrolmen just to provide the same level of service and protection that is now being provided. We fear that surveillance details by alcohol law enforcement officers will even have to be eliminated because of the overtime payment requirement.

The economic impact on North Carolina's local governments is also enormous and perhaps more devastating than on State government. Our larger cities, Charlotte, Greensboro and Raleigh expect in fiscal year 1985-86 costs of \$500,000, \$600,000, and \$233,000, respectively. Our smaller towns may suffer even more. For example, Wendell, North Carolina, with a population of 2,386 persons, has 23 employees and expects additional costs in fiscal year 1985-86 of \$30,000, which on a per capita basis is over \$12 per person for that community. In order to comply with Garcia, City leaders in Wendell may have to delay or cut off services or raise taxes by 5 cents per \$100 assessment. Beleaguered and overtaxed property owners should not be subjected to these additional taxes.

I am submitting into the written record along with my testimony a chart which provides available information on retroactive costs, compliance costs for fiscal year 85-86 and the comparative effect on current property tax rates for a sample of cities and towns in North Carolina.

<u>City</u>	<u>Retroactive Cost</u>	<u>1985-86 Fiscal Year</u>	<u>Comparative Increase In Current Tax Assessment Per \$100</u>
Charlotte	\$110,000	\$500,000	\$.05
Greensboro	N/A	\$600,000	\$.01
Raleigh	\$124,000	\$233,000	N/A
Fayetteville	\$ 50,000	\$100,000	\$.01
Chapel Hill	N/A	\$100,000	\$.015
Hickory	\$ 50,000	\$150,000	\$.0125
Elizabeth City	\$ 10,000	\$100,000	\$.05
Kernersville	\$ 6,000	\$ 20,000	\$.005
Carolina Beach	\$ 10,000	\$ 25,000	\$.01
Wendell	N/A	\$ 30,000	\$.05

County governments also expect increases in costs. Johnston County, a rural county in North Carolina, informs us that they will have to hire 9 new deputies and expect \$390,000 to \$400,000 more in additional costs which will result in an additional tax on property owners of \$.04 per \$100.

In addition to the monetary costs, many communities report problems in employee relations resulting from the blanket application of the Fair Labor Standards Act to them. County governments have had to provide competitive employment with private sector and provided a personnel system that employees wish to retain. Time-off or compensatory time is liked by employees and its elimination has caused a morale problem. Fayetteville, in eastern North Carolina, also reports an adverse effect on motivation. Overtime pay for wage earners will reduce the incentive to accept promotions to exempt managerial positions because the wage earner will earn more through overtime payments. Hickory, North Carolina, also reports disgruntled employees who would rather have time off than overtime pay. Carolina Beach, a coastal town which enjoys a large number of vacationers in the summer, reports problems resulting in the inability to use compensatory time during the winter months for overtime during the summer months. In general there is objection to the loss of control over employee relations and transfer of this control to the Department of Labor.

Let me share with you a few examples of what could happen to the level of services that are currently provided to our citizens. In Greensboro they have a special program in their parks and recreation department that provides field trips to such places as Washington, D.C. for the mentally and physically handicapped. The costs of these trips are expected to double. In Guilford County the Register of Deeds Office is currently open from 8:00 a.m. to 5:00 p.m. The clerks frequently remain in the

office 15-45 minutes beyond closing time to finish processing the seeds to have accurate records. The county anticipates having to reduce the hours of service available to the public in order to give the clerks an extra hour of processing time each day without incurring overtime liability.

We are also concerned about the impact on Emergency Medical Services and volunteerism. In Guilford County, for example, there is a central dispatch system for ambulance service. They also provide a small subsidy to one private provider. Many of the EMS workers volunteer their services to these other providers on their days off. It is anticipated that these volunteer services will have to be terminated because workers are prevented from volunteering their services under the Fair Labor Standards Act.

In summary, Garcia will adversely impact all public employers in North Carolina, in their budgets, in employee relation and the level of services we provide.

While we appreciate the assistance of the Reagan Administration through the Department of Labor's decision not to enforce Garcia until October 15, 1985, this moratorium does not protect North Carolina or its cities, towns, and counties from private lawsuits. What is needed is corrective legislative action and I applaud the Senate and Subcommittee's prompt response to a critical problem for the state and local governments.

The devastating effect of Garcia on the sovereignty of North Carolina and all states must also be noted. While it is for the Court to reconsider its opinion that state sovereignty guaranteed by the Tenth Amendment is dependent upon procedural safeguards rather than fundamental rights as the other rights included in the Bill of Rights, the Court's decision calls on the Legislative Branch and particularly the U.S. Senate to be the appropriate forum for the protection of state's rights. I therefore strongly urge that not only do the economic effects compel legislative action,

but the U.S. Senate must reaffirm the traditional constitutional status of federalism. It continues to be my opinion that the states' role in our federal system rests on the United States Constitution and not upon the decisions of elective federal officials, but under Garcia it is the decision of Congress. It appears to me as it did to Justice Powell in his dissent in Garcia that the Court has taken the unprecedented view that Congress is free under the Constitution to assume a state's traditional sovereign power and to do so without judicial review of its actions. I cannot avoid the conclusion that this view relegates states to the trivial role the opponents of our Constitution feared at the time of its adoption and is a rejection of almost 200 years of our understanding of the federal system. This rejection of precedent is evident by the total lack of previous cases cited by the majority of the Supreme Court in reaching its conclusion. Your recognition that states' rights require remedial action will perhaps lead our Supreme Court to reconsider its opinion and restore the Constitutionally mandated balance of power between the State and federal government, a balance designed by our founding fathers to protect our fundamental liberties.

In conclusion, I respectfully urge that Congress act to correct Garcia, not only to avoid the adverse impact of an uneconomic and burdensome system but in recognition of states' sovereignty in this area.

Senator NICKLES. Governor Martin, we appreciate your comments.

Lieutenant Governor Hobby.

Lieutenant Governor HOBBY. Mr. Chairman, thank you very much.

The purpose of my testimony is to discuss, from the legislative perspective, some of the problems we have experienced with the *Garcia* decision. Some of these may be unique to Texas because of our system of State government, but I think a large number of these problems are common to all States.

No one in State government could have anticipated the outcome of the *Garcia* case, Mr. Chairman. This has presented two major problems: One is the potential liability for overtime, retroactive to the date of the decision last February, and the other is the brief time we have had to accommodate the Fair Labor Standards requirements in our new budget. As best I can pick a figure out of the air, and this is a rough figure, this potential overtime liability is probably in the order of \$20 million.

Many, and perhaps most, State legislators are not in session as regularly as is the Congress. The Texas Legislature, for example, meets in regular session only for 140 days every other year. The timing and effect of the *Garcia* decision creates particular difficulties for States in which executive agencies have limited budget execution authority. Agencies often do not have sufficient budget flexibility to cope with exigencies, like the *Garcia* decision, without legislative approval.

In Texas, for example, appropriations for the current fiscal year were made nearly two years before the *Garcia* decision. Agencies have had to try to meet these standards with pre-*Garcia* budget and staffing patterns, and for agencies with limited ability to transfer funds, the choice is between sharply restricting overtime and allowing time off at time and a half within a single pay period. Neither choice is viable for law enforcement, mental health or for corrections agencies in which the manpower availability is a critical safety matter.

Additionally, many legislatures face a continuing challenge to meet state needs within constitutional budget limitations. We do not have the luxury of debating the size of the deficit because we are allowed none. Rather, we must project and balance our budget needs with considerable precision. For states like Texas that have rapidly growing populations, the *Garcia* decision is a particular problem.

In one respect, the timing of the *Garcia* decision was fortunate for Texas. The decision was rendered when our legislature was in session and was able to respond. However, the brief duration of our sessions meant that we had very little time to assess the fiscal impact and formulate that response.

It is one thing to draft policies for compliance; it is another to assure that we make sufficient appropriations to finance those policies. I believe that we did the best we could, given the revenue, the time and the information available, but we have precious little margin for error.

The final issue I would like to address relates to the application of the overtime provisions to State legislatures. Unlike the Con-

gress, we do not have the option of exempting ourselves from these provisions. This poses a problem for States whose legislatures meet infrequently and for relatively brief periods.

As I mentioned, in Texas we meet only for, roughly, 5 months every 2 years, and there is a great deal to be accomplished in a very short period of time—and we cannot do this without substantial overtime being worked.

During our recent regular session, more than 4,700 bills and resolutions were filed. Legislative committees held hearings on more than 4,300 of these bills. The legislature ultimately passed about 1,300, including the biennial appropriations bill.

Much of the work necessary is done by employees who are not on the personal staffs of legislators and do not qualify as executive, professional, or administrative personnel for the purpose of overtime; therefore, they are not exempt from the Fair Labor Standards overtime provisions. Two examples are our legislative council and our legislative budget board.

The council is the primary drafting arm of the Texas Legislature. Its staff works closely with legislators, their staffs, and committee staffs in drafting these several thousand pieces of legislation, and additional thousands of amendments to them. Substantial overtime work by technical, clerical, and other support staff of the council is necessary.

The budget board staff performs several functions. In addition to its work with the appropriation bill, it prepares fiscal impact analyses on each bill that receives a public hearing. These fiscal notes are required to be updated and revised with each amendment to the bill, as it goes through the process.

In addition to these employees and committee staffs, the Senate and the House each requires a substantial number of employees just to provide the support necessary to an efficient operation while the legislature is in session. Most of these employees would not be exempt from the Fair Labor Standards overtime provisions.

In conclusion, I would ask that you give consideration to the problems of many of the state legislatures. I do not mean to suggest that the *Garcia* decision has caused the sky to fall. I believe that, given sufficient time, we could work out most of our problems. The timing of the decision and its retroactive application—seem to have created the greatest difficulties. Some relief in this respect would be helpful.

My other request is that Congress begin to treat State legislatures in the way it treats itself with regard to employees of the legislative branch. This is no more than a recognition of the place of our State legislatures in our Federal system, and does not seem too much to ask.

Thank you, Mr. Chairman.

[The prepared statement of Lieutenant Governor Hobby follows:]

Application of the Fair Labor Standards Act to State Employees:
Impact on State Government in Texas

Testimony of William P. Hobby, Jr.
Lieutenant Governor of Texas

The purpose of my testimony is to discuss, from the legislative perspective, some of the problems we have experienced with the Garcia decision. Some of these may be unique to Texas, because of our system of state government. Other problems probably are common to a large number of states to some extent.

I do not believe that anyone in state government could have anticipated the outcome of the Garcia case. This has presented two major problems. One is potential liability for overtime retroactive to the date of the decision. The other is the brief time we have had to accommodate the FLSA requirements in our new budgets.

Many, perhaps most, state legislatures are not in session as regularly as is the Congress. The Texas Legislature, for example, meets in regular session only for 140 days every two years. The timing and effect of the Garcia decision create particular difficulties for states in which executive agencies have limited budget execution authority. Agencies often do not have sufficient budget flexibility to cope with exigencies, like the Garcia decision, without legislative approval.

In Texas, for example, appropriations for the current fiscal year were made nearly two years before the Garcia decision. Agencies have had to try to meet FLSA standards

with pre-Garcia budget and staffing patterns. For agencies with limited ability to transfer funds, the choice is between sharply restricting overtime and allowing time off at time and one half within a single pay period. Neither choice is viable for law enforcement, mental health and corrections agencies in which manpower availability is a critical safety matter.

Additionally, many legislatures face a continuing challenge to meet state needs within constitutional budget limitations. We do not have the luxury of debating the size of our deficit because we are allowed none. Rather, we must project and balance our budget needs and available revenue with some precision. For states like Texas that have rapidly growing populations, the Garcia decision is a particular problem.

In one respect, the timing of the Garcia decision was fortunate for Texas. The decision was rendered when our Legislature was in session and available to respond. However, the brief duration of our legislative sessions meant that we had very little time to assess the fiscal impact and formulate that response. It is one thing to draft policies for compliance. It is another to assure that we make sufficient appropriations to finance those policies. I believe we did the best we could, given the revenue, time

and information available. But we have precious little margin for error.

The final issue I wish to address relates to the application of the overtime provisions to state legislatures. Unlike the Congress, we do not have the option of exempting ourselves from those provisions. This poses a problem for states whose legislatures meet infrequently or for relatively brief periods.

Texas perhaps is an extreme example. As I mentioned previously, our Legislature meets regularly only for 140 days every two years. This means that a great amount of work must be accomplished in a short period of time. We cannot do this without substantial overtime being worked.

During our recent regular session, more than 4,700 bills and resolutions were filed. Legislative committees held public hearings on more than 4,300. The Legislature ultimately passed more than 1,300 of these, including the biennial appropriation bill. Much of the work necessary is done by employees who are not on the personal staffs of legislators or do not qualify as "executive, professional or administrative personnel" for purposes of overtime. Therefore, they are not exempt from the FLSA overtime provisions. Two examples are our Legislative Council and Legislative Budget Board.

The Council is the primary drafting arm of the Texas Legislature. Its staff works closely with legislators, their staffs, and committee staffs in drafting these several thousand pieces of legislation and additional thousands of amendments to them. Substantial overtime work by technical, clerical and other support staff of the Council is necessary.

The Budget Board staff performs several functions. In addition to its work with the appropriation bill, it prepares fiscal impact analyses on each bill that receives a public hearing. These fiscal notes are required to be updated and revised with each amendment to a bill during the legislative process. Again, a substantial amount of overtime work by non-exempt support personnel is necessary.

In addition to these employees and committee staffs, the Senate and House each require a substantial number of employees just to provide the support necessary to an efficient operation while the Legislature is in session. Most of these would not be exempt from FLSA overtime provisions.

In conclusion, I would ask that you give consideration to the problems many of us in the state legislatures are experiencing. I do not mean to suggest that the Garcia decision has caused the sky to fall. I believe that, given

sufficient time, we can work out most of our problems. The timing of the decision and its retroactive application seem to have created the greatest difficulties. Some relief in this respect would be helpful.

My other request is that the Congress begin to treat state legislatures the way it treats itself with regard to employees of the legislative branch. This is no more than a recognition of the place of state legislatures in our federal system and does not seem to me to be much to ask.

Senator NICKLES. Thank you, Lieutenant Governor Hobby. We appreciate your comments.

I think Governor Lamm will be joining us in a few moments.

All of you have mentioned the need or necessity to have some fiscal planning and budgetary planning. Do each of you have constitutional amendments that mandate a balanced budget?

Governor Ashcroft.

Governor ASHCROFT. We have a mandated balanced budget in the State, and we also have a revenue limitation, so that in the event that we were even to increase taxes—if tax revenues go up inordinately, we have to refund them to the taxpayer, so we have a two-fold limitation on the State's capacity to devote resources to this counterproductive ruling.

Senator NICKLES. What about Texas and North Carolina?

Lieutenant Governor HOBBY. It's a similar situation in Texas.

Senator NICKLES. You have mandated that you have to live within your means. Is it the same thing for North Carolina?

Governor MARTIN. North Carolina has a constitutional limitation on the balanced budget.

Senator NICKLES. You are not like Congress, in that respect, you have to live within your means.

Governor MARTIN. Exactly.

Senator NICKLES. Governor Ashcroft, you mentioned it would probably cost the State of Missouri \$8 million?

Governor ASHCROFT. That's in the overtime provisions alone, but that doesn't account for the new accounting and personnel procedures, the additional book work and the like; that would be just to adjust our current practices to reflect the imposition of the *Garcia* relating to overtime.

Senator NICKLES. And that is just strictly State costs; that's not going through and adding up what it would be through municipalities, the counties, and—

Governor ASHCROFT. Yes, and I have to indicate that that is sort of a preliminary estimate. I don't think any of us can, with a great deal of accuracy, forecast the entire impact.

Senator NICKLES. It's interesting, though, because all of us have been trying to figure up what it is. Lieutenant Governor Hobby mentioned the fact that they are trying to budget, and you have 2-year budget cycles in Texas. I would think that would be very hard—most of your legislatures are probably adjourned by now, I would assume, or close to it. And one, in trying to estimate the impact and then to budget for it, and then to figure, really—actually, you are supposed to be in compliance April 15.

Are you in compliance now?

Governor ASHCROFT. It's caused some significant dislocations. We've had some of the horror stories—perhaps not as dramatic as those you submitted regarding the homicides, but obviously we are making a very strong effort to be in compliance, and it is hurting our ability to deliver services.

Senator NICKLES. If any of you want to answer these questions, I will just throw them out to the panel.

Governor MARTIN. I will certainly add that we are in compliance.

Lieutenant Governor HOBBY. So are we, Governor.

Senator NICKLES. The impact or the desirability to have concrete estimates—one of the pluses, I think, of offering compensatory time—whether it be highway patrol, firefighters, or whatever, would be that you are working with fixed budgets. You do need to know how much it is going to cost for the fire department, the highway patrol, or whatever, but you don't know exactly when the fire is going to come, or when the emergencies are going to come, or when the hurricanes are going to come, or whatever, or when the tourists—you can plan on the tourist season, but you know you are going to have some offsets when it's colder. It seems to me that it would be to the employees' advantage if he knows—say somebody working for fish and wildlife, and each of you have fish and wildlife departments—if you have a particularly busy time. You know when quail season is, or dove season, or deer season, or whatever, so they are going to be busy during that period time. There is also going to be times during the year when they are not busy. They may end up working 60 hours a week, or whatever, during the hunting season, but you also know they're not going to have to work very much, say, in December, or whenever the off months might be. But you could offer comp time to them in lieu of level monthly payments. I know that some of the people who are going to testify today, or at our subsequent hearings, will say in order to comply they will end up making some salary or hourly adjustments down, thinking that it might, or guesstimating that at the end, it might come out even. Whereas if you use the comp time you can level it off and comp for, basically, the overtime or the heavy action times that you already know are going to be there and set aside and give them a nice annual, level salary.

You can budget on that salary, you can budget cash flow, whereas you wouldn't have that opportunity to do so through the unexpected like tragedies or disasters. You know they are going to be there and you have to plan accordingly. Would that be correct?

Governor ASHCROFT. There is no question about that in my State. Governor Martin mentioned some highway patrolmen being killed in his State. We had a manhunt that went for 7 days; our ability to spread the demand of that manhunt out over the year allows us to accommodate it within the limits of our current budget, but when you commandeer the forces of the National Guard, which were involved, the State highway patrol, and we had sheriffs, officers, local public safety officials all involved in it; it would have had cataclysmic financial impact on every level of government in the State of Missouri to mount that kind of effort which was necessary to bring the assailant to justice, or the alleged assailant, and I think it is important that we have that flexibility.

Senator NICKLES. Do you have any other comments along that line?

You mentioned some budgetary constraints. I think I heard, I believe, from all of you a resentment, to some extent, of the courts. Somebody mentioned congressional intrusion; but in this case more from the courts, where, really, they are making decisions that you should be making, or that your State legislature should be making.

Is that correct, as well? In other words, you read the 10th amendment and you think it was there for a purpose?

Governor ASHCROFT. That's my judgment. I want to go on record as saying that I think the 10th amendment was there for a purpose.

Senator NICKLES. Any other comments on that?

Governor ASHCROFT. That, of course, was argued before the Supreme Court, and the invitation that they extended was for the Congress to set it right, and we hope that you will.

Senator NICKLES. We will endeavor to do so. I appreciate your comments and the expertise that you have given. I know that all of you are very busy and have a lot on your agenda, but I think it's important for this record to show that: One, this is not a partisan issue, and that it touches, really, all corners of the United States. Contrary to some articles that I read said it didn't affect the Northeast. I think we will find, before these 3 days of hearings are over, that it will affect every corner of the United States, as far as the impact of this statement, once people really get into finding out how far it reaches.

Thank you all very much for your presentations.

Governor MARTIN. Thank you, Mr. Chairman.

Senator NICKLES. On our next panel are George Voinovich, mayor of Cleveland, OH, representing the National League of Cities; James Thomas, president-elect of the National Association of State Personnel Executives, from Oklahoma City; John Bourne, mayor of North Charleston, SC, representing the U.S. Conference of Mayors; and Senator Joseph Harrison, majority leader, Indiana Senate.

Mr. Voinovich, do you care to be first?

STATEMENT OF HON. GEORGE V. VOINOVICH, MAYOR, CLEVELAND, OH, REPRESENTING THE NATIONAL LEAGUE OF CITIES; JAMES C. THOMAS, PRESIDENT-ELECT, NATIONAL ASSOCIATION OF STATE PERSONNEL EXECUTIVES, OKLAHOMA CITY, OK; HON. JOHN E. BOURNE, JR., MAYOR, NORTH CHARLESTON, SC, REPRESENTING THE U.S. CONFERENCE OF MAYORS; AND HON. JOSEPH W. HARRISON, MAJORITY LEADER, INDIANA SENATE, ATTICA, IN, REPRESENTING THE NATIONAL CONFERENCE OF STATE LEGISLATURES

Mayor VOINOVICH. Thank you.

Mr. Chairman, I am George Voinovich, mayor of the city of Cleveland, president of the National League of Cities. NLC represent some 15,000 cities throughout the United States of America.

The likely effect of requiring cities to comply with the Fair Labor Standards Act in its present form will be reductions in public services, tax increases, and/or layoffs of State and local employees. We need your immediate help and we need it now.

Senator NICKLES. Mayor, before you proceed, I would like to ask all of our panelists—just looking at the clock—if you could summarize your statements, we will put all of your statements in the record, and maybe if you could try and shoot for no longer than 7 minutes—I'm not going to ring a bell or anything, but we will shoot for that. Thank you.

Mayor VOINOVICH. I'll try and respect that.

The Department of Labor, as you know, has already announced plans to begin enforcement activities against States and localities, beginning on October 15, and to impose liability back to April 15. A lot of lawsuits have already been filed; it's a jungle out there in terms of the number of lawsuits.

Our primary concern is the overtime provisions of the Fair Labor Standards Act. I'd like to emphasize that the minimum wage provisions of the FLSA have no impact on cities. All cities are paying more than minimum wage—way above it. We certainly don't want Congress to get involved in the minimum wage, or the subminimum wage. If Congress tries to get into the minimum wage issue, nothing will ever get done.

The practical effect of applying the overtime provisions to cities will be direct Federal interference with the operation of city government, and our collective-bargaining agreements. I want to underscore the fact that the FLSA interferes with our collective-bargaining agreements. We've had very sophisticated labor agreements with our employees for many, many years.

The use of compensatory time in lieu of overtime pay, of course, as you know, will be prohibited. Many of our police officers and firefighters bank compensatory time, or take the time off later on. The FLSA will require changes in existing scheduling practices, many of which are longstanding, and interfere with our collective-bargaining agreements.

While the cost of complying with the overtime provisions of the FLSA is difficult to measure at this time, we believe that the cost will be in excess of \$1 billion for local governments. Los Angeles is talking about \$100 million; New York estimates \$40 million; Chica-

go, \$20 million; Baltimore, between \$10 and 17 million; in Cleveland, it's going to cost us about \$4 million.

What do we want you to do? I agree with the governors, you ought to just exempt us from the FLSA. We were exempt from the FLSA until the *Garcia* decision. Yet, I don't think you can show there has been any abuses during that period by State government or local government. We ought to be exempt from the FLSA.

If there is no support for an exemption, we would like to see you do at least five things. First, we would like you to eliminate the retroactive application of the FLSA. We would suggest that it should take effect a year from now, or at the beginning of our next budget cycle, or at the end of our collective-bargaining agreements. But if Congress doesn't do something the retroactive liability, these are going to many lawsuits filed. Even if you do pass legislation, it's going to take years for litigation to resolve the retroactivity questions. Consequently, we think that the retroactive application of the FLSA an important matter that needs to be addressed.

Second, we think that the FLSA should be amended to allow for continued use of compensatory time by cities, a matter which is already, as I said, covered by our collective-bargaining agreements.

Third, the maximum number of permissible hours in a 28-day work period of 212 for firefighters and 171 for police officers, established by the DOL in 1983, particularly when considered in conjunction with the DOL's broad definition of compensable time for public safety employees, is unworkable for many cities. POL defines eating time and sleep time as compensable time. These regulations are unrealistic, and we think they should be changed.

Fourth, the special penalty provisions of sections 16 (b) and (c) of the FLSA, which establish the double damages penalty for failure to comply with the FLSA, should be eliminated with respect to states and localities. In other words, if we don't pay that overtime out within the required time period (within the next pay period), we have to pay double damages.

There are a lot of cities around this country, and smaller communities, that will have, from a bookkeeping point of view—major problems. They're not computerized, they just can't plug in the numbers and pay overtime. We are willing to acknowledge that we owe it, but to say that we have to pay overtime within the affected pay period of time or be subject to double damages is ridiculous.

Fifth, the FLSA should be amended to make clear that states and localities may continue to use volunteers without violating the FLSA.

With what is being being cut back in Washington, what's included in tax reform, and the elimination of revenue sharing, volunteers are going to be doing a whole lot more in cities than they have ever done before. They are very much involved, for example, in the city of Cleveland. We are particularly concerned about volunteer firefighters. If they are paid more than \$2.50 for expenses. When they go out to fight a fire, they are covered by the FLSA. The Governors have already described the redtape that is involved. As a result, we think that volunteers should be exempted from the FLSA.

I will conclude my remarks by saying that if we take what's happened during the last 5 years, in terms of Congress cutting back on

supprt by cities, if we looks at what's involved in the deficit reduction package then it is easy to see that city programs are under attack—revenue sharing and the elimination of tax deductibility, when compounded by the Fair Labor Standards Act, suggest that the National Government, including the courts, the administration, and the Congress, attacking local and State government and basically, saying to us, "Fend for yourself, we don't care about you." I think that prompt action on the FLSA would be a signal that Congress still understands what those of us out on the streets are going through in order to provide the services for our fellow citizens, and those fellow citizens are your fellow citizens.

Thank you.

[The prepared statement of Mayor Voinovich follows:]

Statement of
GEORGE VOINOVICH
MAYOR, CLEVELAND, OHIO

on behalf of
THE NATIONAL LEAGUE OF CITIES

Mr. Chairman and members of the Subcommittee, I am George Voinovich, Mayor of Cleveland and President of the National League of Cities (NLC). I am here today to testify on behalf of NLC, which represents 15,000 cities through direct membership and membership in 49 affiliated state municipal leagues, regarding the problems facing cities as a result of the recent Supreme Court ruling extending the Fair Labor Standards Act (FLSA) to cities and the need for immediate congressional action.

The likely effect of requiring states and localities to comply with the FLSA in its present form will be reductions in public services, tax increases, and/or lay offs of state and local employees. Immediate congressional action to mitigate the impact of the Supreme Court's February 19, 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority to extend the FLSA to all state and local employees is imperative. The Department of Labor (DOL), in a June 14 statement, has already announced plans to begin enforcement activities against states and localities on October 15 and to impose liability on states and localities retroactive to April 15. Moreover, a number of lawsuits have been filed by state and local employees in various

jurisdictions seeking retroactive back pay and damages under the FLSA. Despite DOL's broad discretionary authority, the precedent of the initiatives taken by the Presidential Task Force on Regulatory Relief, and the legislative history of the FLSA, we do not believe that there is any reason to expect meaningful reform of the existing FLSA regulations by DOL in the near future.

For cities, the primary area of concern is the overtime provisions of the FLSA, which require the payment of overtime compensation on a time and a half basis for hours worked in excess of 40 a week. For most cities, the minimum wage provisions of the FLSA are a problem only to the extent of their application to volunteers, such as volunteer firefighters, who are reimbursed for incidental expenses. In fact, we are not aware of any city employees who are receiving less than the minimum wage.

The practical effect of applying the overtime provisions to cities will be direct federal interference with the operation of city government by prohibiting the use of compensatory time off in lieu of overtime pay and requiring changes in existing scheduling practices, many of which are based on long-standing practices or have been established by collective bargaining agreements. Countless changes must be made in employment practices in the middle of budget cycles and collective bargaining agreements.

While the cost of complying with the overtime provisions of the FLSA is difficult to measure at this time, we believe that it is in excess of a billion dollars. Even in cities where city employees are covered by collective bargaining agreements that limit the hours of work and provide for generous compensation plans, the costs of FLSA compliance will be substantial. For example, Los Angeles estimates that its costs are in the \$50 to \$100 million range; New York estimates nearly \$40 million; for Chicago, the estimate is in the \$20 million area; Baltimore estimates \$10 to \$17 million. We have every reason to believe that the cost of compliance will be substantially greater on a per employee basis in rural and suburban communities where employment practices are frequently less structured than in the big cities.

BACKGROUND

In 1974, Congress extended the wage and hours provisions of the FLSA to state and local employees, including police officers and firefighters. The legislation initially approved by the House and Senate extended the FLSA to state and local employees; the House bill, however, exempted public safety employees from the FLSA. As a result of these differing approaches, a compromise ultimately emerged from conference which provided for a "partial exemption" for public safety employees,

with an eight-month delay in the effective date and a two-year phase in period, and full coverage for all other state and local employees. Several key matters affecting the implementation of the partial exemption for police officers, firefighters, and prison guards were left to DOL for resolution, including the definition of compensable time for purposes of calculating overtime liability and the maximum number of permissible hours before overtime compensation must be paid. It was clear, however, that Congress intended to provide states and localities with broad flexibility regarding schedules for public safety employees.

This intent, however, is not reflected in existing DOL policies. Immediately after the 1974 amendments were enacted, DOL began a rule making proceeding to implement the partial exemption for public safety employees. Those regulations, issued in final form in December of 1974, eliminated much of the flexibility originally provided by Congress by defining compensable time more broadly for police officers and firefighters than for other categories of employees. However, DOL's regulations were stayed by the Supreme Court in 1975, and the Supreme Court ruled in 1976 in National League of Cities v. Usery that the FLSA could not be applied to state and local employees engaged in traditional governmental functions under the

Tenth Amendment of the U. . Constitution which reserves various powers to the states. As a result, the FLSA has never been enforced with respect to state and local public safety employees.

DOL, while it was precluded from enforcing its 1974 regulations regarding state and local public safety employees, did not formally withdraw those regulations and, consequently, a rule making proceeding is not necessary in order for DOL to begin enforcement proceedings against state and local governments. Moreover, during the ten-year period in which these regulations were invalid with respect to state and local employees, DOL undertook a second and equally important rule making proceeding which resulted in a substantial reduction in the maximum number of permissible hours for police officers and firefighters. Section 7(k) of the FLSA, 29 U.S.C. Section 207(k), states that, following the completion of a two-year phase in period, the maximum number of permissible hours in a 28-day work period would be reduced from 240 to the lesser of 216 or "the average number of hours . . . in tours of duty for" public safety employees in 1975 as determined by a DOL study. Based on a study of hours worked by federal police officers and firefighters (who were subject to the requirements of the FLSA) DOL established the maximum number of permissible hours as 216 for firefighters (the equivalent of a 54 hour work week) and 186 for police officers (the equivalent of a 46.5 hour work week).

Organized labor challenged DOL's failure to include state and local firefighters and police officers in the sample used for the study and, in Jones v. Donovan, DOI was ordered by the court to redo the study, taking into account the hours of state and local public safety employees. In 1983, after redoing the study of hours worked in 1975, DOL established the maximum number of permissible hours as 212 for firefighters and 171 for police officers. Cities, because they were not subject to the FLSA at the time the study was undertaken, were not involved in the proceeding and, consequently, we do not know whether the data relied on by DOL was accurate and complete. Moreover, it is unclear what methodology DOL used in determining the total number of hours worked by police officers and firefighters. For example, was meal time excluded in counting the hours worked by police officers? If so, the number of permissible hours under DOL's rules may be set artificially low as DOL's regulations define meal time for police officers as compensable time. It is clearly unfair for cities to be subject to a rule setting the maximum number of hours permitted in a work period when that rule was established in a proceeding in which states and localities were not involved.

CONGRESSIONAL ACTION

The 1974 amendments to the FLSA governing states and localities and the DOL regulations promulgated in 1974 and 1983 pursuant to those amendments suggest that the political system is not necessarily responsive to the unique concerns of state and local government as the Supreme Court assumed was the case in the Garcia decision. The Garcia decision, in overruling National League of Cities v. Usery, relied to a large extent on the fact "that the national political process systematically protects States from the risk of having their functions . . . handicapped by Commerce Clause regulation." In fact, Justice Blackmun, writing for the majority in Garcia, cited the inclusion in the FLSA of "special provisions concerning overtime pay for law enforcement and firefighting personnel . . . to take account of the special concerns of States and localities with respect to these positions" (i.e., the Section 7(k) partial exemption) as evidence of the efficacy of the political system. In fact, the opposite is the case as the provisions of the law and the regulations create innumerable problems for states and localities, particularly with respect to fire prevention and police protection, the most basic of governmental functions.

It is becoming increasingly clear, particularly in light of DOL's failure to establish regulations which recognize the problems involved in running a police or fire department, that Congress must amend the FLSA to minimize interference with the day-to-day operation of state and local government. The original purpose for the enactment of the FLSA in the 1930's was to create more jobs by penalizing employers who worked their employees for long hours, thereby encouraging the hiring of additional employees. The way in which the FLSA has been applied to states and localities by the courts and DOL is expected to have the opposite effect: the number of jobs in the public sector is likely to be reduced.

The establishment of an FLSA policy which recognizes the unique responsibilities of state and local government would be consistent with Congress' approach to other employers with special problems. As the FLSA was amended over the years to cover new categories of employees, Congress established exemptions and special provisions which were designed to accommodate the particular needs of various employers. For example, taxicab drivers are exempt from the overtime provisions of the FLSA. 29 U.S.C. Section 213(b)(17). Similarly, car salespersons and employees of movie theaters are exempt from the overtime provisions of the FLSA. 29 U.S.C. Sections

213(b)(10)(A) and (27). Babysitters and employees engaged to provide "companionship" service for those who are unable to care for themselves are exempt from both the minimum wage and overtime provisions of the FLSA. 29 U.S.C. Section 213(a)(15). There are a series of additional exemptions and special provisions for agricultural and seasonal employees. It is clear that state and local government merit similar treatment.

Amendments to the FLSA are necessary to accommodate the needs of state and local government. As a matter of policy, NLC opposes federal involvement of any sort in the establishment of employment conditions for employees of state and local government and believes that states and localities should be exempt from the FLSA. However, because our primary objective is an immediate and practical solution to the many problems now facing cities, I am going to focus on the five areas of the FLSA where revisions to accommodate state and local government and to minimize the disruption of employer-employee relations are essential.

First, Congress should take immediate action to eliminate the retroactive application of the FLSA to states and localities, many of which are just beginning to understand the complex requirements of the FLSA and DOL's regulations. In 1974, Congress recognized the disruption which sudden application of

the FLSA to states and localities would cause and, accordingly, provided for a deferred effective date and a two-year phase in period for public safety employees. Congress should establish a similar transition period, particularly for police officers and firefighters.

We believe that the application of the FLSA to states and localities should be deferred until the later of the beginning date of the governing body's next fiscal year, the expiration date of existing collective bargaining agreements, or one year from today. Under such a policy, cities would have adequate time to revise schedules, payroll practices, budgets, computer programs, and collective bargaining agreements. In any case, because the existing FLSA regulations are so complicated and burdensome, a deferred effective date is necessary to ensure that cities, particularly smaller cities which do not have access to specialized counsel, have the time to familiarize themselves with their new obligations under the law.

Second, Congress should amend the FLSA to allow for the continued use of compensatory time by cities. Under the "comp." time concept, employees are allowed to accumulate overtime to be used at a later date in the form of time off from work. Under the FLSA, that practice is effectively precluded, despite the

fact that many city employees prefer comp. time to overtime compensation, apparently because of the opportunity to take longer vacations than would be permitted under annual leave policies. From the city point of view, comp. time is essential because it provides the city with the ability to respond to emergencies, such as snow storms and crimes, without incurring unanticipated liability for overtime compensation. In many cases, comp. time policies have been established by collective bargaining agreements at the request of the employee unit. In fact, NLC's Office of Federal Relations has received irate calls from numerous city employees decrying the elimination of comp. time.

Third, the maximum number of permissible hours in a work period for firefighters and police officers established by DOL in 1983, particularly when considered in conjunction with DOL's broad definition of compensable time for public safety employees, is unworkable for many cities. Moreover, it is our view that the overtime provisions of the FLSA should not be applicable to states and localities.

Under the FLSA, the most common schedule for firefighters is 24 hours on duty and 48 hours off duty (or nine duty shifts totalling 216 hours in a 27-day period) is no longer permissible. Under a schedule of this type, a city would be liable for overtime compensation for 12 hours every 27 days because the maximum number of permissible hours in a 27-day work period is 204. At a minimum, the maximum number of permissible hours in a work period should be increased to accommodate the 24-48 work cycle. Similarly, cities should be provided with additional flexibility for the scheduling of police officers, particularly in light of the emergency nature of police work which necessitates that police officers frequently work unscheduled hours in order to complete criminal investigations. If these changes are not made, many cities will be forced to lay off public safety and other employees.

Fourth, the special penalty provisions of Sections 16(b) and (c) of the FLSA, 29 U.S.C. Sections 216(b) and (c), which establish the double damages penalty for failure to comply with the FLSA should be eliminated with respect to states and localities. During this period of uncertainty in which matters such as effective date will not be determined until they are litigated, it is clearly unnecessary to subject cities to additional penalties.

Fifth, the FLSA should be amended to make clear that states and localities may continue to use volunteers without violating the FLSA. The use of volunteer firefighters, which presently number an estimated 1,000,000, is likely to become very costly for states and localities unless changes are made in the FLSA regulations. Under the existing DOL regulations, a volunteer firefighter who receives more than \$2.50 per call as a stipend is construed to be an employee unless the governmental entity can show that the volunteer's incidental expenses were in excess of \$2.50. 29 CFR 553.11(a). The use of volunteer firefighters is a long-standing practice throughout the nation and that practice is likely to be discouraged by DOL's regulations which require extensive record-keeping and will limit the governing body's ability to reimburse the volunteer for difficult to document expenses, such as automobile, cleaning, and training costs.

CONCLUSION

The FLSA has been applied to cities by the courts and DOL in a manner which fails to recognize the governmental responsibilities of cities. Moreover, it comes at a time when cities are facing the termination of the General Revenue Sharing (GRS) program which has been used by many cities to pay a part of the costs of operating police and fire departments. In addition,

a key provision of President Reagan's tax proposal is the elimination of the deductibility of state and local taxes, a proposal which the Treasury Department has estimated will reduce municipal revenues. In other words, just as we are hit with a costly federal mandate, our fiscal capacity to pay for additional costs of complying with the overtime provisions of the FLSA or to raise more local revenues is in jeopardy.

Congress must begin to recognize the effect of its policy determinations on cities by revising the FLSA to ensure that cities can govern without unnecessary federal interference with their basic governmental responsibilities. The first step in that process should be the establishment of an immediate moratorium on the application of the FLSA to state and local government. In addition, the FLSA should be amended to authorize the use of comp. time and to modify the overly restrictive overtime provisions, particularly with respect to police officers and firefighters. Finally, in order to ensure expedited action on the FLSA, we strongly oppose the inclusion of unrelated matters, such as the subminimum wage for youth or an increase in the minimum wage, which would create controversy, thereby delaying action on a matter of fundamental concern to cities and city employees. Expedited congressional action is essential.

Thank you.

Senator NICKLES. Thank you very much. I appreciate that. I also would concur that, yes, they are our constituents, all of our constituents, and all of us, I think, share that concern, to see if we can't make some improvement.

Mr. Harrison from Indiana.

Senator HARRISON. Thank you, Mr. Chairman. I certainly appreciate this opportunity to be here to represent the National Conference of State of Legislatures. I am chairman of the NCSL Pension Committee and, of course, as you know, we represent the 7,400-plus legislators, State legislators, around the United States and the territories.

We have adopted unanimously a resolution encouraging, as the mayor has said, the exemption of State and local governments from the Fair Labor Standards Act and have, further, amended that to say that if that is not possible, at least from the overtime provisions and the volunteer provisions of that act, there would be a severe consequence.

We at NCSL are very cognizant of the 10th amendment. We deal strongly with our belief that the 10th amendment does provide a division between the responsibilities of the Federal Government and the responsibilities of the State and, therefore, the local governments, and that we certainly are interested in that provision.

As a practical matter, it is a constitutional question, we believe, but even more so, we believe that it is a practical matter of division. The fact is that we in the State legislatures and those in the mayors' offices and the city councils and the county commissioners are home all the time—we are with our group.

By the very nature of your service here in Washington, you must need to be away from your homes, from your home States, on many occasions for great lengths of time. We have, not only the opportunity, but the duty to finish our legislative sessions and live under the laws, and with the bargaining agreements, and with the provisions that we have provided not only for the citizens of our States, but also for the citizens of the local units of government.

This is not even to mention the division that we find—the differences we find even regionally within NCSL, and yet we know that what we say in Indiana is not, perhaps, applicable in Oklahoma or South Carolina or California. We realize that, we recognize those differences, and we respect those differences; but even with those differences being recognized, we unanimously support the congressional action.

But I think that we have focused, and many have focused here, and many will focus here on the governmental units. I suspect that the most important parties are not the ones who serve here, but the ones who are served. That, of course, is all the constituencies that we share equally.

Senator Quayle, of course, is on this committee, and he and I share well over 110,000 people in the State of Indiana, they're the same folks, and so we are serving the same constituency when we do the job that we are assigned to do.

These people, the citizens of the State of Indiana and the other 49 States and the territories, will be subjected to costs—there will be costs; if no action is taken by the Congress, if no subsequent action is taken within the legislatures and city councils, there will

obviously be costs. It's been referred to as certain numbers of dollars, millions, hundreds of millions, perhaps billions. The very fact is that we're, not any of us, sure at this point what the total ramification of the *Garcia* decision will be.

There is no real way to put a handle on it, as we say, for those things are just now being looked into, the contracts, all the provisions, and the ramifications are sort of in the process of being totaled up at the State and local level.

But the fact is that this group that we concurrently serve have voiced very great opinions about what they want and what they believe. First of all, they want and believe that we ought to improve our services, and we ought to improve the lot of our State and local employees. There is no disagreement on this event.

It is how we get this paid for and how, most effectively and efficiently, we use these dollars to pay for them. The citizenry, in general, want the services, but they don't want to pay little or any more for those services. They want business as usual, the normal progression of things; they don't want costs that are hoisted on by a court decision or by inaction.

Now, the other group, I think, is certainly one of the prime considerations of this hearing today, and that is the employees involved. I don't want, certainly, from the NCSL point of view—and I've talked to many, many of my colleagues from all over the country—I certainly don't want to leave with this committee the idea that there is a large-scale employee animosity against exempting us from portions of the Fair Labor Standards Act as a result of the *Garcia* decision.

I think it fair to say that in most legislatures, in most city halls around the country, around the different States, the compensatory time situation, which is a very, very common practice—every State that I know of has some form of it—those issues and those types of work relationships were hammered out at the insistence of the employee groups in negotiation with their State legislatures and with their city councils and their county commissioners.

These were not management-oriented policies of working procedures; they were done in concert and in conjunction with the employees' groups because of the stress that has already been mentioned, because of the other unique factors that are in our State's—not one the same with the other. They have been done on a local level because they were handled that way and they were accepted that way.

Now, finally, I think that it might be well to say that we in the State legislatures and I assume, certainly at the mayors' offices and city councils, et cetera, are a very innovative group. We are political beings, much as all people who serve in Congress are: we react to the reactions of our people. Perhaps we react a little more rapidly because we're maybe closer to them, on most occasions, but the fact is that the tax mood¹ the mood for no taxation, for no additional costs is there.

They, they, the legislators; they, the city council people, will find ways to not be raising taxes above any of the amounts that they absolutely have to, and even those, they will try to put the responsibility of raising those taxes somewhere else.

I think that is very fair to say, it is a very common technique. The fact is that we're going to say, "If it happens to us, well it's those people who didn't act; it's the court, it's somebody else. We have protection."

I will say that with very great candor because in 1982 and 1983, most every State went through terrible throes of fiscal difficulty. As some of the Governors mentioned, we did not have the option of the surplus; we did not have the option of the deficits. We went to our people and said, "Hey, folks, the government is about to collapse. We can't pay the teachers, we can't pay the firemen, we can't pay these people; we have to raise taxes because our revenues have been drying up with the economic conditions we're under." We taxed them.

We went to the barricades and said, "People, we need your help. Will you accept it?" By and large, as far as I know, they were accepted all over the country. I don't know of a legislative colleague of mine who was defeated because he voted for increasing taxes in Indiana, or any other States who faced the difficult situation of those times.

The reaction of the public will come, however, when there are not some innovative method used to prevent these costs from going forward, to prevent the things from happening that have already become acclimatized with our group. The citizenry, the employees and, in general, the legislatures and city councils of this country have become very used to, very comfortable with compensatory time agreements, the bargaining agreements, all of the other facets that have improved and should be there and to continue the improvement basis for employees and for the services they provide and for whom they provide them.

Finally, I think that it's fair to say that we will have a very difficult situation, and those of us who believe that we can get in and get our legislative jobs done at a particular time and in a particular semblance of order—our taxpayers in my State, and many of our surrounding States, and the ones I'm familiar with, they like us to be home more than they like us to be in the capital. And the fact is that because of our own particular situations—and I think Governor Hobby indicated it—we are not able to exempt our employees, as perhaps is the case in other legislative groups.

We do thank you for this opportunity to testify before you. I do want to indicate, as a second hat—so that you will not misunderstand—that my overall position was for NCSL. I do, after having been in concert and representation with both the minority and the majority of the leadership in the State of Indiana, we unanimously agreed on this. And, by the way, the public employees groups—I met yesterday with the representatives of the public safety groups, and they are extremely concerned that no action will be taken in this area. They are very jealous of the things they have gained, and they know that in the political process and in the governmental process, we, as the politicians, will make adjustments, whatever it takes, so that we do not take the brunt of the *Garcia* decision.

[The prepared statement of Senator Harrison follows:]



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STATEMENT OF

SENATOR JOSEPH W. HARRISON

MAJORITY LEADER, INDIANA SENATE

CHAIRMAN, NCSL PENSIONS COMMITTEE

ON BEHALF OF THE

NATIONAL CONFERENCE OF STATE LEGISLATURES

BEFORE

THE LABOR SUBCOMMITTEE

OF THE

UNITED STATES SENATE

LABOR AND HUMAN RESOURCES COMMITTEE

JULY 25, 1985

REGARDING

THE APPLICATION OF THE FAIR LABOR

STANDARDS ACT TO STATE AND LOCAL

GOVERNMENTS

Mr. Chairman and members of the Committee:

Thank you for the opportunity to testify on the impact of the Garcia decision.

I am Joe Harrison, a state senator from Indiana, and I appear today as a representative for the National Conference of State Legislatures (NCSL).

I have been a member of the Indiana Senate for 19 years and served as Majority Leader for the last 5 years. For many of these years I have been active in the National Conference of State Legislatures and now serve as chairman of the NCSL Pensions Committee.

I welcome this opportunity to speak on behalf of NCSL, the official representative of the country's 7,461 state lawmakers. Our organization encompasses legislators of every philosophical persuasion and political affiliation. It includes articulate spokesmen for the important concerns of our people including those of organized labor as well as those of management. What unites us all is a common desire to preserve the vitality of the federal system. As a result of the Garcia decision, we believe that a fundamental alteration of the relationship between the states and the federal government will occur unless Congress assumes greater responsibilities for defending the federal system.

The U.S. Supreme Court in Garcia v. San Antonio Metropolitan Transit Authority held that the 10th Amendment provides no protection for state and local governments from federal regulation under the Fair Labor Standards Act (FLSA). The decision has significant consequences for constitutional

federalism, but the immediate impact is to suddenly impose unanticipated costs and extreme administrative burdens on states and localities who now must comply with the FLSA.

NCSL has no objection to the Fair Labor Standards Act per se. Its purposes are humane and progressive. We at NCSL recognize the progress and improvements resulting from the enactment of the minimum wage law and related labor legislation.

The National Conference of State Legislatures supports legislation to either exempt states and localities from the FLSA or at the very minimum limit FLSA coverage of states and localities. The FLSA must be amended to adapt it to the special employment circumstances found in providing state and local government services. One particular example is the traditional use by states and localities of compensatory time off in return for overtime hours worked. We also believe that legislation should be limited to state and local concerns. We have no position on proposals to establish a special minimum wage for youth or to change the dollar figure of the minimum wage. We do not think it appropriate to tie such proposals to this legislation. Moreover, we do not believe that the legislation which we are supporting will be used in this way.

Except to ensure that legitimate volunteers are exempted from FLSA coverage, we are not asking you to amend the minimum wage requirements of the FLSA even as they apply to state and local governments. The states already provide minimum wage protection for their workers. I personally know of no state or local governments which pay its regular employees less than the minimum wage (except for Puerto Rico and the American territories which are special

cases). There is no need for the federal government to mandate a minimum wage, but as a practical matter a mandate will not affect our budgets or personnel practices. NCSL believes as a matter of principle that federal minimum wage standards are not appropriately applied to states and localities under our constitutional system of federalism, but we are willing to put aside theoretical concerns about the minimum wage to improve the chances of passing legislation to address our deep concerns about the impact of other FLSA provisions on state budgets and personnel policies.

Our chief concern is the immediate burden on state and local taxpayers of hundreds of millions of dollars in FLSA compliance costs. The cost of complying with the record keeping requirements of the FLSA will be significant. Even more expensive will be the cost of defending against lawsuits seeking judgments for back pay, liquidated damages, attorneys fees and court costs. The most expensive cost will be paying time and a half for overtime instead of providing compensatory time off for overtime hours worked.

Most of these additional taxpayer dollars would not be expended if we could preserve the long-established practice within state and local governments of awarding compensatory time for overtime work. The FLSA outlaws our traditional "comp-time" practices and instead requires that overtime work be compensated with time-and-a-half pay.

The character of the work which state and local employees perform is unique. The demands for state and local services often vary widely with the season. Much of it is also unpredictable. As a consequence, time-and-a-half-pay for largely uncontrollable overtime work will devastate the budgets of many

jurisdictions. Estimates of the total cost to state and local governments range up to \$1.5 billion.

Mr. Chairman and members of the committee: I would respectfully relate to you a truth which I think you already know. No new revenue sources will be available to pay for additional overtime costs. We are required to balance our budgets under most state constitutions. Legislators will be extremely reluctant at best to raise taxes to meet these costs. Tax rates are fixed in the short term, and any mayor, legislator, governor, city council member, or county commissioner who attempts to raise taxes will quickly be attacked by opponents in subsequent elections.

Since the Garcia decision in February, it has taken some time for states and local governments to adequately evaluate its impact. Now that the potential effects of the decision have been recognized many states and localities are planning to cut public services and cut public payrolls in order to absorb the costs. This defeats the original purpose of the FLSA's overtime provisions which was to increase employment. It also defeats the purpose of most state and local officials who wish to maintain and even strengthen current services in such vital areas as police and fire protection, mental health care, and environmental protection.

Perhaps the reduction of public services would be justified if payment of time-and-a-half for overtime were necessary to ensure fundamental fairness to state and local workers. In fact the FLSA overtime provisions are not. By and large, state and local workers are very well organized. Their influence is widely felt in the collective bargaining process and in election campaigns. It

is to the political advantage of state and local officials to grant public employees every reasonable benefit possible without incurring the wrath of the larger taxpaying public. The fundamental difference in the employer - employee relationship in the state and local government sector as opposed to the private sector must be kept in mind.

The "comp-time" system as currently used in many jurisdictions, has proven to be a fair way of balancing public employee and taxpayer interests. Many public workers, especially those in stressful occupations, prefer the time-off to overtime pay. It is also an economical method of adjusting to the seasonal and unpredictable nature of the demand for many public services.

The comp-time system (in contrast to the FLSA system of time-and-a-half pay for overtime) takes account of the need for public employees to work flexible schedules. For example, forest fire fighting and snow removal may require round-the-clock work for days and weeks. I am told there were sixteen thousand fire fighters from all over the country battling forest fires in western states during recent weeks. Under the comp-time system, after an emergency such as they have just experienced in the west, public employees can be given extensive periods of paid leave. The comp-time system, thus, balances the seasonal and unpredictable nature of the work with the need to maintain a trained and organized work force in readiness. A time-and-a-half system of overtime pay, by contrast, will result in excessive costs. The State of California estimates that the cost of overtime pay in fighting the recent forest-fire emergency in that state will run from \$10 million to \$20 million. As such costs mount, many jurisdictions will be forced to lay off employees or to move to a seasonal employment system that will undermine the professionalism of the work force.

It is our belief that public safety officers should not be forced into a rigid weekly work schedule. Police officers who are pursuing a suspect or handling emergencies such as automobile accidents should not be inhibited in the performance of their duty by a budget officer's demands to control time-and-a-half pay. Recently detectives employed by the District of Columbia were required to cut short time spent on a murder investigation because the necessary time-and-a-half pay would stress the departmental budget. A comp-time system, on the other hand, provides the flexibility required for police work. It accommodates the traditional system in which fire fighters work shifts of 24 hours on the 48 hours off. It also accommodates the traditional scheduling practices for conservation and wildlife workers.

Workers in state institutions including state psychiatric hospitals, homes for the mentally retarded, and correctional facilities are also more effectively employed using a comp-time system. These are extremely stressful occupations. The emotional demands of working with severely disturbed, impaired, or dangerous clients are such that these workers simply must get away from the institution for extended periods. The unpredictable nature of client behavior also makes nine-to-five scheduling unrealistic.

Persons working for state legislatures can also make more effective use of comp-time than time-and-a-half pay. The work of a state legislature much like your work in Congress is seasonal and unpredictable. In the last weeks of the session, legislative work runs late into the night and through the weekend. Clerical workers, computer-operators, secretaries, and security personnel must work extended hours. After adjournment, the pace will slow for weeks and in

some states for months. The sensible policy is to give the exhausted legislative workers compensatory time off in the slack season. Time-and-a-half compensation for such employees, assuming they are not exempt from the act, promises to be so costly that legislatures will probably be forced to hire workers only for the legislative session. This policy seems irrational when we could simply provide comp-time as we have in the past.

Mr. Chairman and members of the Committee: I am sure that your constituents voice the same complaints as mine on the rigidity and unresponsiveness of public bureaucracy. To many of them, government seems inflexible and unable to respond to their individual problems. While such criticisms are sometimes well taken, I believe most government employees are dedicated to public service. The real problem in my view is the rigid and unbending set of rules and procedures which restrict the capacity of public workers to respond in a flexible way to the public demand for services. The overtime provisions of the FLSA will result in the ultimate bureaucratic nonsense and will only multiply our constituents' complaints. The work of the public is not nine-to-five work. It is ridiculous to delay a murder investigation because the scheduled work day is over. To leave states and local governments under the FLSA overtime provisions will place a straight jacket on agencies attempting to respond to emergencies and to the shifting demand for public services.

In addition, the fiscal impact will further curtail the capacity of state and local agencies to respond to the public. The extra overtime costs, required to conform with the FLSA, could not have come at a worse time for state and local governments. Our revenue sources are strained to the limit even though

many states enacted new taxes to balance budgets during the last recession. Moreover, current budget proposals for FY1986 suggest cutting federal aid while leaving in place mandates for expenditures.

Mr. Chairman and members of the Committee: the Garcia decision has severely restricted the scope of judicial review in 10th Amendment cases. At least for the short term, the Supreme Court will not be acting as the vigilant arbiter of our constitutional system of federalism. According to Justice Blackmun's majority opinion in Garcia, the responsibility for defending the federal system now rests primarily with Congress and with the Senate which by its very organization equally represents all fifty states. We strongly urge you to fulfill your historic role and to protect your state's taxpayers from the unnecessary fiscal burden resulting from the imposition of the Fair Labor Standards Act on states and localities.

Senator NICKLES. Thank you very much.

Our next panelist is John Bourne, mayor of North Charleston, SC, representing the U.S. Conference of Mayors. We are glad that you didn't get totally flooded out last night.

Mayor Bourne. Thank you, Senator. I appreciate the opportunity to be here today and to speak for myself, my city and State, and also for the U.S. Conference of Mayors.

I think there's been some question about how broad is the interest in FLSA, and I think it's very broad and getting broader all the time. Those mayors, those governmental officials who think they don't have a problem with the *Garcia* case just haven't looked at it. Every time we turn over another rock, there's a snake, and issues keep coming up all the time that are going to impact on the budget in our city and, for the most part, on all other city budgets because, let's face it, we do virtually the same kind of a thing all the time.

I think one of the problems with the *Garcia* case, this whole business of applying fair labor standards to local government, is it's hard to treat local government like any other business; it just simply isn't. If you are in the manufacturing business, you can decide what you want to build on the assembly line; you can hire the necessary personnel to do it, and you can decide when they come to work and when they leave. We just simply can't do that. We can't decide when we're going to have a big fire, we can't decide when we're going to have a police emergency. It just isn't possible.

Let's face it, our firefighters many times sit around the fire houses, they keep the equipment up, they go through training exercises, but they have a lot of free time in the sense that they're not actively involved, as someone would be on an assembly line; and,

yet, 5 minutes before it's time for their shift to change, they may be called out on a fire.

As Senator Thurmond indicated earlier—and I appreciate that very much—I was elected the mayor of my city at the time of its incorporation. We didn't have 5 cents or one employee, so I've been there all the time. I've helped to build all those things that we have. I think that we, by most standards, have done a pretty good job. The size of our city has increased fivefold, geographically, since our incorporation, and population has grown along with that. We're not a big city by any means, 75,000, but we have some of the same problems—most of the same problems—of other municipalities, either larger or smaller.

I went through the throes of the agony of the 1970's when we didn't know whether we were under Fair Labor Standards or if we were not while the *Usery* case was snaking its way through the Court, and I stood fast because I believed in the 10th amendment. I didn't change any rules or regulations, I didn't try to come under compliance with that act at that time. Some people did because they feared an adverse ruling. I really had faith in the Court and they would rule in our favor, and I was right—but it just goes to show you that you're lucky if you are right half the time in this business because I was sure wrong the next time around, because the Court answered a question that wasn't asked, Senator, and in some way or another, that needs to be addressed.

I handed up a statement, prior to my appearing here today, and I won't go over that too much, but just to maybe hit a couple of the highlights, as it relates to my city.

I'm faced right now—and flying back home, if I can get there because of this weather—and going before our city council tonight to try to take some final steps in coming under what we think are the Fair Labor Standards requirements in our city. We've been moving on this since the day after the Court ruling, February 19.

I began to move because I had gone through the agony before and I didn't want to get caught up in it again. We've knocked on the door of the Labor Department to find out what the rules were. They didn't know—they said they would let us know when they found out. And when they let us know, they said it was retroactive to April 15. So our attorneys are advising us to go ahead and try, as best we can, to comply with it. So we're faced with some financial commitments we're probably going to make tonight to the tune of about \$200,000, which is a considerable amount in our \$12 million budget.

We, very conservatively, think that the impact this year on our budget is a quarter of a million. And there are so many things we don't know. It's just impossible to assess the impact on police.

In a normal situation, our police officers work 40 hours a week; some groups work four 10-hour days and are off 3 days, and they like that; others work five 8-hour days because of their particular jobs, but there are times when they have to work over. It's just hard to keep a police officer home when one of his fellow officers had been killed. I mean you just can't hardly keep him off the streets.

Now, if I understand the Fair Labor Standards Act, if he comes out, if we allow him to come out, even though we didn't call him, if

we can be presumed to have knowledge of it, then we're going to have to pay him.

It's just such a different ball of wax out there when you are in the public sector as opposed to the private sector. In most of our operations, people work 40 hours a week—in fact, most of our clerical people work 37½ hours a week. So we're not violating people's rights, we're not paying them less than the minimum, but there are these very difficult things that we're going to have an awful hard time trying to address, as we are faced with the absolute certainty, it seems at this time, of coming under the Fair Labor Standards.

In my material I handed up, I point out the impact, financial impact, it has on many of the cities of South Carolina—I mean of the state of the Nation. Let me say this, talking about legal action, George, I've already got it. A group of firefighters have already brought suit against our city, alleging that we're violating Fair Labor Standards, and we've got to go back and pay overtime back to the time of the Court ruling.

We began—on May 2, we tried to rearrange our hours in what we thought would be in conformance with Fair Labor Standards; that is, to set aside eating times, sleeping times for firefighters because they are on duty 24 hours and 15 minutes a day, but that's being challenged in this lawsuit. I think it's ridiculous to say that you've got to pay people while they're eating and sleeping, but I just don't know what a court will do with it. If it gets up to the same court that made this last ruling, I'm afraid—I know the direction it will go.

Now, if that happens, the impact on our budget in our small city is going to be \$1 million in the fire department alone. That's exactly what the numbers are. And it doesn't stop there. If you begin to have to increase pay for fire fighters, you are going to have to look at other employees—they all sort of flow together—you've got to look at police and other agencies, so the impact is never ending.

So many things keep popping up, as I mentioned earlier. For instance, in our State we have a very fine police academy; we are required to send all police officers through that academy. We think it's a great program, but it's like going through boot camp; if you go through boot camp, you don't work an 8-hour day. Well, they don't work an 8-hour day at the academy. So here's a State agency that's going set up a schedule for training, and we are required to send our people there, and I suppose we are going to have to pay them overtime for those extra hours that they go through as a part of that training cycle.

Another thing that has been mentioned just briefly, but police, fire, public safety people, public employees generally, consider themselves public servants. Policemen don't really get into police work expecting an 8-hour day, they just simply don't. They get into it because they like police work.

Now, obviously, they want to be compensated, they need to be compensated, but that's not the reason they get there. The same is true for fire. If we have a fire in North Charleston, if it's a bad fire, we don't have to call people out, if it's their day off. We won't be able to let them do that now. I don't know exactly how we will work around it. But there's all those problems that we're confront-

ed with out there. Every day, as I say, every time that we look at it, another rock, another snake.

I would just like to point out something that I know you are aware of, but some of the things—people that are presently exempt, so we're not asking for something unheard of when we ask for exemption of State and local employees or certainly public safety employees.

If you're in the business of buying eggs, poultry, and milk products as an outside buyer, you're exempt. If you are in the process of processing maple syrup into sugar, you are exempt from Fair Labor Standards. If you drive a taxicab, you're exempt from Fair Labor Standards. If you work in a motion picture theater, if you are an announcer or an engineer, or an editor in a radio station with under 100,000 population, you're exempt from Fair Labor Standards. So I would just ask you to compare the importance of those jobs against the importance of police, fire, medical emergency, and others—emergency personnel of cities and states throughout the Nation.

I think the impact, for the most part, is going to be this: We're going to be forced into hiring additional people, and it may take a while to get into it; we try to work, as best we can, with what we've got within our budget.

I think also that the Congress should again look back to 1938. What were the real reasons for Fair Labor Standards? Primarily to create new jobs. If you had somebody working 60 hours a week, two of them, you had to hire a third person. So they were trying to create jobs. Now, I don't believe that the Congress of the United States, the U.S. Supreme Court, or any of the legislatures really want to force cities, counties, states to hire new people.

We've been trying out best to figure out innovative ways to cut the personnel budget. So the impact of this, ultimately, is going to be to, in some cases, pay people more, but ultimately, it will be to hire more people to do the same kind of job because we lose a lot of the flexibility that's afforded to us now under the exemption that we have. It's going to create tremendous management responsibilities.

I have already said to our sergeants, our lieutenants in the police department, "You are going to have to be personnel managers. You are going to have to be responsible for those people that work overtime."

So there are just so many reasons—I know I've talked longer than I should—but I would just like to say this. George Voinovich and I happen to be Republicans, but this is not a Republican, a Democrat, or an Independent issue. I was just handed a copy of a statement by Mayor Tom Bradley of Los Angeles; he comes on very, very strong in support of the kind of things we've been talking about here and the impact that it has on his city.

Let me throw out one additional suggestion. I think it's imperative that something be done immediately. I don't know that we can even wait for the normal legislative processes to grant the kind of relief we need.

I commend you for what you are doing, and I commend the others that are doing it, but it seems to me that someday or another, Congress—the House and the Senate need to grab a bill

that's related to labor in some way or another and tack on an amendment that would put everything on hold until we could do something about it, because we're really pressured right now to come under these standards—and once we make the move, it's going to be very difficult to get back.

Thank you very much, Senator.

[The prepared statement of Mayor Bourne follows:]



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STATEMENT BY

JOHN E. BOURNE, JR.

MAYOR OF NORTH CHARLESTON

on behalf of the

UNITED STATES CONFERENCE OF MAYORS

before the

SUBCOMMITTEE ON LABOR

COMMITTEE ON LABOR AND HUMAN RESOURCES

UNITED STATES SENATE

JULY 25, 1985

Chairman Nickles and members of the Subcommittee, I am John E. Bourne, Jr., Mayor of North Charleston, South Carolina. I am pleased to have the opportunity to appear before you today on behalf of the U.S. Conference of Mayors to discuss the impact of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority on local governments and our recommendations regarding it.

The U.S. Conference of Mayors was founded in 1932 to provide a Washington voice for the nation's cities with a population of 30,000 or more people.

The Conference of Mayors believes that the federal government should not tell state or local governments how to operate. Our local decisions should be ours to make. We are held accountable for them by the electorate. In this regard we differ from the private sector. We also must levy taxes on our citizens and taxpayers to support city services. Implementation of FLSA will raise taxes in my city and state and, I believe, throughout the country.

However, the Congress and the courts have decided otherwise. The current situation in the Garcia case requires that the Fair Labor Standards Act be applied to employees of state and local governments. For the most part city hiring and personnel practices are already in compliance with the Act. Cities, in general, pay the minimum wage or more to entry level employees, do

not take advantage of children, and maintain records on wages, hours and other items. It is in the area of overtime -- specifically the requirement that employees be paid overtime rather than be able to substitute compensatory time off for extra hours worked -- that problems arise.

In a number of cities agreements have been worked out between the government and the employees to allow "comp" time. It benefits both parties. City governments are able to save some money; employees have the flexibility to assure that blocks of time will be available for other jobs, vacations or whatever use they wish to make of it. Neither party is taking advantage of the other with the "comp" time arrangements that have been worked out. For the most part, they have been mutually agreed upon. After all, we cannot select the time to have a big fire or a police emergency.

It appears that much of the difficulty is with public safety -- police and fire -- emergency service and certain custodial personnel. In many localities the work shifts for these employees are not the same as those of other employees and they are not always able to stop work at the prescribed time. The nature of their jobs are different. The FLSA, of course, already recognizes that this is a different category of employment by making different overtime provisions for some of them. These, however, still do not provide sufficient flexibility to local officials.

Of course, different work schedules can be arranged so that cities comply with the overtime provisions of the FLSA. We have figured out in North Charleston what we would need to do. But it will cost North Charleston's taxpayers \$250,000.00. Either property taxes will be increased by 5 percent or we will be forced to reduce the number of police and fire personnel, which may result in a fire insurance rate increase as well as increased crime in our city.

City budgets have been adversely affected by federal and state budget cuts, state and local tax limitations, inflation and other economic factors. Elimination of general revenue sharing and further cuts in many important urban programs have been proposed. In addition, proposals to eliminate the deductibility of state and local taxes and the tax exemption of many development bonds are now being discussed. City budgets are under attack from all sides, and our taxpayers look to you in Congress for relief.

All cities are required to have balanced operating budgets on an annual basis. We have balanced our budgets through personnel and service reductions. With the Garcia decision, however, we are suddenly faced with an unexpected and we believe unfair expense.

The costs are not expected to be inconsequential either:

- o Memphis (population: 645,000) estimates an additional cost of \$536,000 per year just for overtime.
- o Palm Springs, CA (population: 32,000) estimates an additional cost of over \$178,000 in the fire department alone.
- o Charlotte (population: 323,000) estimates an annual cost of \$500,000.
- o Xenia, OH (population: 2,500) projects an annual cost of \$72,000 -- an amount equivalent to an 11 percent pay hike for no additional work.
- o Salem, OR (population: 89,000) estimates \$100,000 in increased costs for fire services alone.
- o Davenport, IA (population: 103,000) projects an extra cost of \$200,000 and expects to have to reduce service or personnel.
- o Sheboygan (population 48,000) estimates an additional cost of \$232,000.

- o Miami (population 383,000) projects an additional cost of \$1.3 million.
- o Denver (population: 506,000) estimates an additional cost of \$1.85 million.
- o Baltimore (population: 780,000) projects an additional cost of \$7 million.

How do we remedy this? Clearly we will get no relief from the Department of Labor. They have interpreted the decision and the FLSA strictly and are not even able to grant a grace -- or transition -- period. The recent policy letter released by the Department states that state and local governments are liable for implementation of the FLSA beginning last April 15, and in my city a group of firemen have already filed legal action under FLSA. In this action, they are contending that the city cannot establish hours of work and that the city cannot deduct from hours worked time set aside for eating and sleeping without first being approved by the firemen. I think this is ridiculous, but I am not sure what a court will do with it. I do know, however, that an adverse decision would have serious financial implications in our city and I believe throughout the country. In fact, if the fire-fighters prevail, it will cost our taxpayers over one million dollars a year.

We, therefore, must look to Congress. There are a range of legislative options which you can consider, including:

- o exemption of state and local government employees from the FLSA;
- o exemption of state and local public safety, emergency service and custodial personnel from the FLSA; or
- o changes in the overtime provisions of the FLSA to allow more flexibility regarding "comp" time, particularly for these limited classes of employees.

We would urge the exemption of all state and local government employees from the FLSA. As I stated earlier, we do not believe the federal government should regulate state or local employment practices.

Let me call to your attention some exemptions from FLSA in present law:

1. Persons engaged in the fishing industry;
2. Outside buyers of eggs, poultry, or milk products;

3. Announcers, engineers, or editors employed by a radio station in a city with a population under 100,000;
4. Automobile salesmen, partsmen, or mechanics employed by an authorized automobile dealer;
5. Persons engaged in the business of processing maple syrup into sugar;
6. Persons employed as taxicab drivers;
7. Persons employed in a motion picture theater.

I ask you, members of the Committee, to compare the importance of these jobs to that of police, fire, EMS, and other essential municipal services.

The Conference of Mayors has opposed the intrusion of the federal government into what are solely local matters and has said that when the federal government mandates additional costs, it should pay for them. We stand ready to explore these different options with you, to determine which would be the most beneficial to all concerned and to work with you to remedy what is a serious problem for many city governments.

Senator NICKLES. Thank you very much, Mayor Bourne. We appreciate your comments.

Senator Matsunaga, do you have any comments?

Senator MATSUNAGA. None at this time.

Senator NICKLES. Our next panelist is James Thomas, president-elect of the National Association of State Personnel Executives, from Oklahoma.

Mr. Thomas.

Mr. THOMAS. Thank you very much, Mr. Chairman.

I am administrator of the Oklahoma State Office of Personnel Management, and president-elect of the National Association of Personnel Executives, on whose behalf I appear today.

We appreciate the opportunity to comment on the application of the Fair Labor Standards Act to State and local employees, and we certainly commend you for your action in introducing this needed legislation.

I have previously submitted for the subcommittee's use a more detailed analysis of the impact of *Garcia* that our association has conducted. It elaborates on what we believe to be errors in the majority's opinion and the adverse administrative and fiscal consequences caused by that decision. Therefore, I would just simply speak briefly about our concerns and why relief from *Garcia's* effects are needed.

As one would expect in a Federal system, there is a wide diversity among States in personnel policies; and although, essentially, all jurisdictions meet the minimum wage standards, a minority of State governments were complying with its work time and pay rules when *Garcia* was announced. Instead, they were following policies formulated in response to statutory and fiscal requirements, administrative needs, customs of the workplace and, in many cases, employee preference. In short, they were doing what worked for them in their individual and varied circumstances. Sometimes changes were required, but the pace of change was very manageable.

Complying with the *Garcia* decision has demanded a rate of change that has created major difficulties in assuring uniform and efficient administration. Without warning, we have been told to re-examine recordkeeping and compensation procedures with respect to a complicated thicket of Federal law, regulation and judicial precedent.

Where such procedures are found wanting, we need to design new ones, coordinate policy between agencies, and implement them with a minimum cost and disturbance. Moreover, we've been asked to do this not for a single enterprise or a restricted category of employment, but for a vast range of activities performed in dozens, if not hundreds, of organizational settings.

Because many Members of Congress have held office at the State level, I'm sure you understand the enormity of such a challenge. A few jurisdictions, such as my own State of Oklahoma, quickly realized the implications of the decision, and, trying to avoid excessive liability, began trying to determine those costs in implementing the *Garcia* decision. The exact cost is yet to be determined across the nation as these burdens are still emerging.

We have just completed a survey which estimates, briefly or roughly, that the cost to implement *Garcia* nationally will probably be around \$500 million in State governments alone. That only covers the payroll costs and not the cost of administration or the cost of litigation.

Unfortunately, many states are ill prepared to assume these new expenses. The bottom line of the New Federalism is that States have been asked to shoulder new fiscal and administrative burdens while Federal participation has decreased and, of course, the prospects are very poor for increased financial assistance from the Treasury.

FLSA will make virtually all programs more expensive, not just those which are or have been aided by Federal grants, so there is a certain irony in expecting States to take on greater responsibilities at the same time that services are becoming more expensive to render.

The national association believes that the best solution is to restore matters as they stood prior to the *Garcia* decision. This decision represents an unwarranted and, in fact, an unnecessary intrusion of national authority. It is inconsistent with federalism, it imposes costs in excess of benefits, and it's not needed to protect the interests of Government workers.

Alternatively, we would urge amendments to the act to recognize the unique status of public employees. Government institutions and their incumbents have a special status and independence of the marketplace. They also have an obligation to the public interest that appropriately colors personnel practices and pay. At the very least, attention should be given to full exemptions for such categories as law enforcement, firefighting, correctional services and recreational services.

Significant relief could be obtained from a simple extension of time for State and local governments to comply. Although it appears that the Department of Labor wishes to be sensitive to our needs, the best way to provide breathing room is for congressional action.

Our suggestion is that application of the act be deferred until Congress has had the opportunity to determine the fiscal and administrative impact of *Garcia* and decide whether or not it is appropriate or inappropriate for application.

It is very important that public entities during this period be accorded immunity from litigation. The liability pot builds daily as State and local governments defer implementation. It is extremely important that this legislation be considered as early as possible.

Thank you very much for your consideration. Today on behalf of the association that I represent, I would like to offer our continued assistance in completing the research which we presented today, and pledge my personal and organizational support for your proposed legislation.

Thank you.

[The prepared statement of Mr. Thomas follows:]

NASPE

National Association of State Personnel Executives

(Remarks on the impact of the Garcia decision, for presentation to a U.S. Senate subcommittee)

Mr. Chairman, Members of the subcommittee; good morning. My name is James C. Thomas. I am Administrator of the Oklahoma state Office of Personnel Management and President-elect of the National Association of State Personnel Executives, on whose behalf I appear today. My colleagues in state and local government and I appreciate the opportunity to comment on the application of the Fair Labor Standards Act to most state and local employees.

As you know, the Act was extended to state and local government as a result of the recent and unexpected decision of the Supreme Court in Garcia vs. San Antonio Metropolitan Transit Authority. This decision has brought in its wake a multitude of administrative and fiscal problems, exacerbated by the suddenness of its effects. Complying with FLSA would be difficult enough had it occurred following congressional study and public debate; it is made much worse when one is caught unaware that the Court is preparing to set aside long-established principles of federalism.

I have previously submitted for the Subcommittee's use a more detailed written analysis of the impact of Garcia. It elaborates on what NASPE believes to be the errors in the majority's opinion and its adverse administrative and fiscal consequences. Therefore, today I should like to briefly speak about our concerns and why relief from Garcia's effects is needed.

As one would expect in a federal system, there is wide diversity among the states in their personnel policies. Although essentially all jurisdictions meet the FLSA minimum wage standards, a minority of state governments were complying with its worktime and pay rules when Garcia was announced this past February. Instead, they were following policies formulated in response to statutory and fiscal requirements, administrative needs, customs of the workplace and even employee preference. In short, they were doing what worked for them in their individual and varied circumstances. Moreover, because these policies were forged in the open environment of government, they usually represented the consensus of all interested parties, including employees. Sometimes changes proved to be necessary, but the pace of change was manageable.

The Garcia decision has demanded a rate of change that has created major difficulties in assuring uniform and efficient administration. Without warning we have been told to re-examine recordkeeping and compensation procedures with respect to a complicated thicket of federal law, regulation and judicial precedent. Where such procedures are found wanting we must design new

ones, coordinate policy between agencies, with appropriate executive and legislature, and implement them with minimum cost and disturbance. Moreover, we've been asked to do this not for a single enterprise or restricted category of employment, but for a vast range of activities performed in dozens, if not hundreds, of organizational settings.

Because many members of Congress have held office at the state level, I am sure you understand the enormity of such a challenge. A few jurisdictions, such as my own state of Oklahoma, quickly realized the implications of the decision and began trying to determine the costs and complications of Garcia. The exact dimensions of these burdens are still emerging, but a just-completed NASPE survey shows there will be a very substantial impact. The expense of time-and-a-half overtime pay is only a part of this. Payroll outlays will also be swelled by the cost of additional workers--needed because states have lost flexibility in scheduling worktime. Greater expenses for recordkeeping and administration will also be incurred. Their prices will be known only after FLSA implementation is accomplished. In many jurisdictions the cost will be reflected in service cutbacks.

And unfortunately, many states are ill-prepared to assume these new expenses. The bottom line of the New Federalism is that states have been asked to shoulder new fiscal and administrative burdens while federal participation has decreased. And of course, the prospects are poor for increased financial assistance from the federal treasury. FLSA will make virtually all programs more expensive--not just those which are or have been aided by federal grants. So there is a certain irony in expecting states to take on greater responsibilities at the same moment that services are becoming more expensive to render.

What, then, should be done about these problems? NASPE believes the best solution is to restore matters as they stood pre-Garcia. This decision represents an unwarranted and, in fact, unnecessary intrusion of national authority. It is inconsistent with federalism, imposes costs in excess of benefits, and is not needed to protect the interests of government workers.

Alternatively we would urge amendments to the Act to recognize the unique status of public employees. Government institutions and their incumbents have a special status and independence of the marketplace. They also have an obligation to the public interest that appropriately colors personnel practices and pay. At the very least, attention should be given to full or partial FLSA exemptions for such categories as law enforcement, fire-fighting, correctional services and recreational services.

Significant relief could be obtained from a simple extension of time for state and local governments to comply with Garcia. Although it appears the Department of Labor wishes to be sensitive to our problems and needs, a Congressional directive is

certainly the best way to provide some breathing room. Our suggestion is that application of the act be deferred until Congress has had the opportunity to determine the fiscal and administrative impacts of Garcia. Public entities should also be accorded immunity from litigation during this interim period. This would permit states, counties and cities to clearly establish administrative direction and to budget the necessary resources. It should be noted that the data presented in our survey today represents only the early, tentative evidence of the burdens of hasty compliance with FLSA. Further study is certainly warranted to better assess these escalating costs and determine whether the presumed benefits of FLSA appear justified.

Thank you for your consideration today. On behalf of the National Association of State Personnel Executives I would like to offer continued assistance in completing the research presented today and return at a later date to help this Subcommittee as it decides legislative direction with regard to the Fair Labor Standards Act and its application to state and local government. You may be sure we share your interest in fair and efficient personnel administration and wish to be active in formulating the resolution of this issue.

NASPE

National Association of State Personnel Executives

July 22, 1985

Contact: Linda Carroll
Council of State Governments

Analysis of Compliance with the FLSA on February 19, 1985

Introduction

In its five to four decision of February 19, 1985 the U.S. Supreme Court ruled it is constitutional to mandate the application of the Fair Labor Standards Act to State and local governments. This ruling in Garcia vs. San Antonio Metropolitan Transit Authority overturned a 1976 decision in National League of Cities vs. Usery, in which the Court ruled the FLSA requirements did not apply in "areas of traditional governmental" functions.

The impact of the FLSA on State governments is not yet fully realized. It is evident, however, states must now carefully examine their personnel systems to determine compliance with the FLSA. Although the Act does exempt employees who are defined as "bona fide" executives, administrators, professionals and the personal staffs of elected officials, those exemptions do not apply to the vast majority of state government personnel. Therefore, the FLSA's requirements for minimum wage, overtime and reporting requirements are of great concern to personnel administrators.

For these reasons, the National Association of State Personnel Executives (NASPE) decided to conduct a survey of State government personnel offices to determine the fiscal and recordkeeping impact of this U.S. Supreme Court Ruling. NASPE is an organization of personnel administrators representing the United States and its territories. Staff services for NASPE are provided through the Council of State Governments.

The questionnaire, designed by NASPE members and CSG staff, addresses the cost of compliance with the FLSA, the level of compliance with the FLSA on the date of the decision and additional specific questions related to individual activities of the personnel agencies to insure compliance.

Introduction (Con't)

The survey, sent to the personnel director in each state is attached.

Fifty four percent of the states surveyed responded to our questionnaire. They are a representative sampling of State government employment statistics throughout the nation. The responding states constitute:

- 51 percent of the total state government workforce (FTE)
- 44 percent of all collective bargaining states
- 34 percent of the nation's total state government payroll.

Because a number of states are still working toward full compliance with the FLSA it is necessary to insure their confidentiality. The information provided in this document demonstrates a composite view of the effect of the FLSA and individual state responses are withheld.

Impact on States and Employees

A number of the states indicated adoption of the provision of the Fair Labor Standards Act (FLSA) prior to the February 19, 1985 ruling by the United States Supreme Court. The extent of any states compliance with FLSA prior to February 19 was not a part of this survey.

The questions pertained exclusively to the employees who are not exempted in the FLSA. This is all categories of employees except those defined as administrators, executives, professionals, and the personal staffs of elected officials.

The use of compensatory time as a means of repaying employees for hours worked over 40 was a common practice in state government. In fact, it was frequently the employees choice. The guidelines of the FLSA essentially require payment of time and one half for hours worked over 40 per week. The NASPE survey showed, however, a significant number of respondents (77%) used compensatory time to repay those employees not exempt in the FLSA.

The survey asked states to identify the percentage of their workforce who are eligible for cash overtime payment as a result of the FLSA. Seventy percent of the states responding said one half or more of their workforce is eligible as a direct result of the FLSA. For the states responding this represents approximately 793,000 employees. For the nation, this number increases to 1.5 million. The survey also indicates 64% of the states which paid more than half their employees for hours worked over 40 per week, also used compensatory time. Of those states which paid less than half their employees for overtime worked, ninety-two percent awarded compensatory time.

The categories of employees who must now be paid overtime as a result of the Garcia decision includes; police, fire fighters, corrections, hospital, highway, recreational, maintenance, and data processing workers. The numbers of employees in each of these categories was not available at the time of this writing. Table 1, however, does show a detailed analysis of the total number of employees in the responding states and the number of state employees who serve in selected functions. Although these numbers do not take into account the percentage of employees who may be exempt

TABLE 1

State Government Employment - (Full Time Equivalent)
Total and for Selected Functions
States Responding to Survey on the Impact of FLSA

State	Total (By 1000)	Law Enforcement	Highways	Hospitals	Corrections
Arkansas	36	768	3524	5,037	1,359
California	248	9,053	15,284	32,094	13,554
Colorado	43	740	3,028	6,826	2,102
Connecticut	48	1,286	4,085	9,547	3,297
Georgia	83	1,663	6,132	13,733	6,700
Hawaii	38	N/A	857	2,854	860
Idaho	14	222	1,565	508	
Kansas	39	687	3,540	5,473	1,642
Louisiana	82	1,347	7,702	19,583	5,084
Maryland	80	2,164	4,822	13,185	6,004
Massachusetts	75	1,616	5,337	18,510	5,150
Missouri	64	1,697	5,671	13,486	3,020
Montana	14	303	1,711	1,270	618
Nebraska	27	504	2,149	3,894	1,312
Nevada	12	291	1,286	638	1,141
New Hampshire	14	278	1,727	2,075	423
North Dakota	13	180	810	2,250	266
Oklahoma	62	1,398	3,610	10,601	3,565
Oregon	40	982	3,402	5,760	1,926
Pennsylvania	123	4,703	15,393	30,119	4,318
Rhode Island	20	238	874	2,636	966
South Carolina	58	1,277	4,395	10,359	3,349
South Dakota	12	276	1,154	1,430	331
Tennessee	65	925	5,067	9,735	4,401
Texas	176	2,879	14,158	35,866	8,420
Washington	67	1,262	4,966	8,415	3,969
West Virginia	34	837	5,720	5,319	733
	1,587	37,576	127,941	271,197	84,510
All States:	3,083	75,086	241,499	544,526	182,426

Source: U.S. Bureau of the Census, Pub. Rep. in 1982

Impact on States and Employees (Con't)

from the FLSA, they do provide a more detailed review of the nationwide impact.

The states responding to the survey represent 1,587,000 or 51% of the total (full time equivalent) state government workforce. Table 1 illustrates four categories of employees who must now receive cash overtime payment for hours exceeding 40 per week. These four categories make up 32% of the total state workforce for the responding states.

There is a high correlation between the states with collective bargaining agreements and the payment of time and one half for hours worked over 40 per week. Seventy five percent of the responding states with collective bargaining agreements were paying for overtime hours to over half their employees. Sixty-six percent of the states without collective bargaining agreements stated they paid time and one half to less than fifty percent of their non-exempt employees on the date of the decision.

It is important to note in this general discussion of the impact of the FLSA a basic difference in the services provided by some government workers in contrast to the private sector. A number of the services described, law enforcement, highway maintenance, medical services, etc., are unique to state and local governments. They are frequently provided on an as needed basis and often are available for 24 hours at a time. There is no means of determining what impact the FLSA may have on this delivery of services. It is certain to be costly and requires careful analysis to assess the fiscal implications.

Fiscal Impact

The Fair Labor Standards Act now requires public employees to be paid \$3.35 an hour and time and one half for hours worked over 40. There are certain exceptions to the overtime requirement which were mentioned earlier.

The standards for determining exemptions are clearly outlined beginning with 29 CFR 541.1, but it is important to remember the numbers of clerical, maintenance, and other personnel who fall outside the strict definition of a professional, administrator, or executive.

A number of these employees were compensated at time and one half for hours worked over 40 prior to the February ruling. However, as was previously stated, a significant number were not. The cost of paying these employees is an issue specifically addressed in our survey. States were asked to estimate the additional annual financial impact the FLSA requirements are to the payroll. The U.S. Bureau of the Census, Public Employment in 1982 reports total payroll for all state government functions at \$50,277,270,000.

The portion of survey respondents (62%) who were able to estimate the additional cost represent 34 percent of the total state government payroll. These states report a total additional annual payroll cost of \$144,400,000. Based on the total payroll of the seventeen states responding to this question (16.9 billion), this figure represents just under a 1% increase in total payroll costs. Ten of the states responding to this question were unable to provide estimates. The estimated average payroll increase is 8.4 million to each state. Table 2 is a more detailed analysis of this data.

In addition to payroll costs, states incurred certain additional administrative costs in order to meet compliance with the FLSA. Although our survey asked states to estimate the additional administrative cost, few were able to provide this information. States were able, however, to indicate areas where the administrative cost is greatest. More specifically, question (11) asked states to identify what percent of the total cost is in each of the following areas:

- staff training	38%
- data processing	26%
- recordkeeping	27%
- renegotiation of collective bargaining agreement	8%

TABLE 2

Analysis of Additional
Annual Financial Impact on States as a result of FLSA

States and Financial Impact		Total Payroll (in millions)
Arkansas -	4 million in additional cost	\$ 486,630
California -	50 million in additional cost	5,220,490
Colorado -	6 million in additional cost	741,580
Georgia -	20 million in additional cost	1,189,540
Idaho -	3 million in additional cost	216,030
Maryland -	20 million in additional cost	1,176,790
Massachusetts -	\$100,000 in additional cost	1,121,420
Missouri -	6.2 million in additional cost	847,400
Montana -	\$300,000 in additional cost	245,520
Nebraska -	\$250,000 in additional cost	355,260
Nevada -	1.3 million in additional cost	230,180
North Dakota -	\$250,000 in additional cost	204,840
Oklahoma -	5.5 million in additional cost	942,120
Pennsylvania -	4 million in additional cost	1,930,510
Rhode Island -	5.5 million in additional cost	323,580
South Carolina -	6 million in additional cost	821,230
Tennessee -	12 million in additional cost	963,210
Total:		\$17,016,330

Average Increase of .008%

Source: (June 1985 Survey, The Impact Of The FLSA On State Personnel,
The Council of State Governments)

FLSA Penalties

The final concern facing personnel administrators as they meet compliance with the FLSA are penalties for violation. Employers who willfully violate the minimum wage or overtime provisions of the FLSA may be fined up to \$10,000 in accordance with, 29 U.S.C. Section 216(a). An employer who has violated either the minimum wage or overtime provisions of the FLSA is required to pay; 1) the unpaid minimum wage or overtime compensation, 2) an equal amount in the form of "liquidated" damages and 3) attorney fees and other costs. In cases where this is a class action suit all employees would be paid and in some instances the court may grant other relief as appropriate.

The potential for private lawsuits in state government is speculated to be high. Personnel directors expressed concerns over both the speed with which they set out to comply with the ruling, and the delays some states are having in analyzing the law and its requirements.

The final survey question asked if personnel officials had any knowledge of private lawsuits which were filed or are pending as a result of the FLSA. Thirty percent of the respondents claimed such knowledge.

Summary of Conclusions

1). The survey found a significant number (77%) of respondents used compensatory time as a means of repaying employees for hours worked over 40 per week. Although this is not the case in all states or with all employees, it does demonstrate a considerable use of compensatory time.

2). The needs and demands of some government positions are unique, placing the employees who work in these services under the provisions of the FLSA is a potentially costly step and one which may result in a reduction of services to insure fiscal responsibility. The original intent of the FLSA, to provide fair labor measures, may be jeopardized by including the unique services available through State government.

3). The additional payroll costs (1%) associated with FLSA compliance are not significant. A number of states, however, are faced with serious financial problems and this further increases their fiscal burden. The costs associated with the administrative changes are not available since states are still in the process of meeting FLSA requirements.

The potential for extensive litigation further increases the costs associated with the Garcia ruling. At this stage, however, estimates on legal costs are not calculated.

4). State government represents a workforce of over three million employees. To a large extent the requirements of the FLSA deemed it necessary to evaluate the positions of many of those employees to determine exempt status.

The guidelines of the Department of Labor Enforcement Policy dictates immediate compliance for most jobs previously determined "non traditional" (USDL Memo 85-249). For some states, however, this task is not one which is easily accomplished due to the size of the workforce and the limited personnel department staff.

S U R V E Y

The Impact Of The FLSA On State Personnel

1. What percent of your states non-exempt employees (those other than Executives, Administrators or Professionals) were paid time and one half for hours worked over 40 each week on the date of the U.S. Supreme Court decision on 2/19/85?

_____ 1. 85% or more
 _____ 2. 50% to 85%
 _____ 3. 25% to 50%
 _____ 4. 01% to 25%
 _____ 5. Never paid time and one half

2. Prior to the 2/19/85 decision how did your state repay non-exempt employees for hours worked over 40 per/ week?

_____ 6. Premium overtime
 _____ 7. Straight overtime
 _____ 8. Premium compensatory time
 _____ 9. Straight compensatory time

3. How does the FLSA requirements for payment of time and one half for hours worked over 40, impact your states method of compensating for overtime?

_____ 10. Drastic
 _____ 11. Moderate
 _____ 12. Slight

4. What percentage (%) of your workforce is eligible for cash overtime compensation as a result of the FLSA?

_____ % Percent
 (13-15)

5. What is the estimated additional annual financial impact on your states payroll as a result of the FLSA requirements for overtime payments? \$ _____.

(16-23)

What percent (%) does this dollar amount represent of your states total payroll? _____%

(24-26)

6. What are the categories of state employees who must now be paid overtime in your state as a result of the FLSA?

_____ 27. Police
 _____ 28. Corrections
 _____ 29. Hospital
 _____ 30. Social Service
 _____ 31. Recreational Service
 _____ 32. Other - please name

7. Is your state planning to employ additional personnel to limit overtime payments?

41. (Yes) _____ 42. (No) _____

If (Yes), please denote the categories of these additional employees and the percent each category may increase.

 43. Full-time _____ 44. % Increase _____
 47. Part-time _____ 48. % Increase _____
 51. Seasonal _____ 52. % Increase _____
 55. Other _____ 56. % Increase _____

8. How many estimated total man hours were spent by your personnel departments' staff to review the FLSA and work toward compliance?

59. Number of manhours. _____

9. What is the actual date when your personnel staff first began its review of FLSA and/or initiated compliance measures?

65. Month/Day/Year _____

10. Does your state have a collective bargaining agreement?

71. (Yes) _____ 72. (No) _____

If (Yes), does the collective bargaining agreement comply or conflict with the FLSA?

_____ 73. Substantial compliance
 _____ 74. Moderate compliance
 _____ 75. Substantial conflict

11. What is the estimated additional administrative cost (in dollars) for your state to comply with the requirements of the FLSA?

76. Total Cost \$ _____

What percent of the total cost of compliance with the FLSA is spent in each of the following categories?

_____ % 85. Staff training
 _____ % 88. Data processing
 _____ % 92. Recordkeeping
 _____ % 95. Renegotiation of collective bargaining agreement.

12. Do you have any knowledge of private lawsuits which were filed or are pending as a result of non-compliance with the FLSA?

98. (Yes) _____ 99. (No) _____

Senator NICKLES. Thank you very much, Mr. Thomas.

I appreciate all of our panels. I know some of you are under time constraints. I heard all of you say that you are concerned about the decision.

I did hear an interesting little disagreement. Mayor Bourne, you mentioned it would mean that you would hire more. We heard some of our previous panel say that the employment impact would be that there would be less employees. It is kind of an interesting statement.

Mayor BOURNE. I think, initially, that will be the impact, but I think in the long haul, we will have to hire more people, because when we're not allowed the flexibility you have to staff to sort of take care of the peaks as they develop. I mean the pressure will just be there—eventually, it may be like a creeping paralysis, but I think in the long range, that will be the impact, because you can't hire people, really, on a seasonal basis. Someone else mentioned about removing the snow and various other things—you need some flexibility in these kind of things. So I think, initially, it may be the reduction of employees because of trying to fall within the budget that you have, but I personally believe that the long-range impact is more expensive government and more employees, to take care of the peaks rather than the valleys.

Senator NICKLES. Mayor Voinovich, would you give your ideas on that?

Mayor VOINOVICH. With the elimination of revenue sharing in the offing we don't have the ability to provide the additional dollars that are needed to take care of the problem that's being foisted upon cities by the Fair Labor Standards Act. I would say that in most cities throughout the country, people will be laid off because of the expense. There won't as many firefighters or police officers.

Maybe Mayor Bourne's community is a little more flush than some of the other communities and has available resources. We're not going to be able to do that in Cleveland.

Senator NICKLES. All of you, mentioned the urgency or the desire for Congress to move quickly. In the legislation I am considering, we will try and allow comp time. We would also try and go back to eliminate some of the legal entanglements that evidently are growing; we will make it retroactive back to the court date. If any of you have any comments on either of those, I would appreciate them, now or later.

We also plan on addressing volunteers in our legislation, as well, so we won't get hung up in the fact that you might have somebody working at a football game or something else afterward.

Senator HARRISON. Yes, Senator; I would describe the urgency strikes in different ways for different groups. The normal budgetary process for a city or town in a particular is on a different time schedule than the State budgeting process.

As you mentioned, by the time, even, we were aware of the potential impact, the legislatures of my State, and many States, were already out of session. In fact, in some States they are prevented from going back, unless for a particular call of the Governor—each State is different, I'm sure. And so in my State, which I am obviously more familiar with, our urgency is that our statutes for allowing flexibility within the State and local governments is provid-

ed by legislation in the general assembly. So it's, again, a catch 22; the cities and counties, and so forth, cannot move because they would be violating State law, and the State legislature is not in there to give that opportunity to even view the situation until next January 1986.

So I think the urgency may be—it is urgent, but it is urgent because of different time constraints.

Senator NICKLES. I understand.

I asked the Governors if they are all in compliance, and they said yes, but I've got a feeling that a good percentage of the States, cities, counties and so on, are not in compliance, and that the vulnerability to lawsuit is enormous, and growing by the day.

Would you care to comment on that?

Mayor VOINOVICH. In terms of the legislation's effective date, we would like you to go back to the date of the *Garcia* decision, which was February 19, rather than the Department of Labor's proposed date—April 15—for imposing liability.

And you are right—there are many States, cities, political subdivisions that are not in compliance. All of us are moving toward trying to comply. Again, if Congress did nothing but establish a period of time during which cities are not vulnerable, and set a prospective date for complying with the FLSA, such as—a year from now, the next budget, or at the end of a collective-bargaining agreement. This would give us some period of time to act, without having to worry about being sued. It would be very, very beneficial for cities, and also would eliminate a lot of lawsuits and expenses.

Mayor BOURNE. Senator, I might just add, that is very important. If there is some way or another that Congress could act quickly and give us some immunity from suit, because we were early-on in our State being sued, but they are popping up. I just got a publication out of an upstate paper last week where the deputy sheriffs were suing the county council in that county because they felt like that they weren't being paid according to the Fair Labor Standards, and it is a matter of interpretation.

As I said, if our interpretation is correct with regard to firefighters, and we can lawfully take eating, sleeping time and do all those kinds of things, that we think are available to them, I think we are in compliance. But we're not sure—you know, the Labor Department played some little funny games about that. On the one hand, they had rules that said if people are on duty 24 hours or more, they can do certain things, and then they came back with a little special ruling, but with firefighters, it's got to be more than 24 hours. So you really don't know—so you go to 24 hours and 15 minutes, and somebody thinks you're playing games—and a court may think that.

There are just so many unknowns out there that we're having to deal with, so I would suggest to you that people who honestly, sincerely want to be, and think that they are in compliance may very well not be, and all they need is one unfriendly employee to find that out.

Senator NICKLES. And that could be a class action suit which would cover x number of months and could be a very expensive thing.

Mayor BOURNE. Yes, sir.

Senator HARRISON. Senator, I would just add one thing. I think the reason that when the original law was passed, it is my understanding that they recognized the difficulty for those who had never had compliance problems, they recognized the difficulty in immediately complying with the law; and I think, if I'm not mistaken, they allowed a significant amount of time for everybody to get their positions together with the original—we, apparently, don't have that luxury with the decision of the Court.

Another thing on costs, I certainly wanted to make sure that we understood that the costs are not always just related to the State and local government. At the behest of the Federal Government, the State of Indiana, and many of our sister States, sent our State employees to the West, to combat the tragic fires that occurred out there, and this was—in Indiana, at least—through our DNR, at the request of the Federal Government. We know we are going to be compensated for those additional costs.

The DNR, and our legislative services agency, just before I left on the plane from Indiana yesterday, indicated that if the compensation for our voluntarism, if you will, in this case, were paid under the tenets of the FLSA, it would cost the Federal Government or whoever reimburses us, about twice as much as it did to do what we were happy to do to help out our sister States in this tragic occurrence.

Senator NICKLES. That's a good example.

Gentlemen. I appreciate your appearance and contributions. We do look forward to working with you, and I hope that we will be successful in moving this through Congress quickly.

Senator MATSUNAGA. Mr. Chairman, I have one question.

Senator NICKLES. Certainly.

Senator MATSUNAGA. This is for Mr. Thomas.

Mr. Thomas, you said that Congress should defer application of FLSA provisions to public employees. Did you mean all public employees?

Mr. THOMAS. Well, of course, our association would like to see us return to the days pre-*Garcia*, in which all State employees were exempt from Fair Labor Standards Act.

Alternatively, if that were not possible, we would like for special exemptions to be provided for those law enforcement, correctional officials, firefighters, and so forth.

Senator MATSUNAGA. Would you support a phase-in of these provisions over, say, 3 to 5 years?

Mr. THOMAS. If it's in the judgment of Congress that Fair Labor Standards Act should apply to State and local governments, certainly there should be some type of phase-in or deferred implementation in which the fiscal impact has time to be administered properly.

Senator MATSUNAGA. Thank you.

Senator NICKLES. Thank you. Anything else?

Senator MATSUNAGA. No further questions.

Senator NICKLES. Thank you, gentlemen, very much. We appreciate your comments.

Our next guest is Governor Lamm from Denver, CO.

Governor Lamm, welcome. We are pleased that you are here. I understand that you were testifying before the Finance Committee earlier this morning.

Governor LAMM. I was, and I apologize for being late.

Senator NICKLES. No problem. Please proceed.

Governor LAMM. I appreciate your flexibility to accommodate me, Mr. Chairman.

I am here, as I heard the last panel, to, in fact, really urge some significant relief in this area. The States and local units of government are staggered now by yet another blow, in a whole list of them that have now come to us, and this is a significant issue, the increasing of our tax burden, on really interfering with our flexibility.

Let me quickly go through, as I have gone in much more detail in my testimony, because you are looking for facts, you are looking for what's happening out there.

We project an across-the-board compliance to cost, just in the first year, some \$15 million to the State of Colorado, and significantly more to local units of government.

We do not have the option of deficit spending to effectuate FLSA compliance. Our constitution, of course, prohibits it.

Second of all, there is a very serious employee morale that I suspect has been commented on by other witnesses. A large number of our people really have structured their work year for comp time. An example—I've given many in my testimony—but employees of the Wild Life Division work long and hard in the summer months, when access to the high country of Colorado is possible. In the winter, when snow precludes access to many of those areas, they have large blocks of compensatory time available for other pursuits. We won't have this option, as you know, under FLSA.

Third in my testimony, I talk about the severe stress that will be put on public safety functions of State government, and even more so on local governments.

In Colorado, existing State statute prohibits the payment of overtime to the State patrol. If we were to pay overtime to our State patrol and other law enforcement, we figure it would cost another \$5 million a year, which is about 25 percent of our personal services budget.

Now, the question that is in front you is, of course, what do you do? There are several legislative options. One would be a total exemption of States and localities from this act.

If you do not choose that option, and you are looking for more ways to tailor relief, which I heard your questions directed to, I think that we must get enough time to cushion the blow, to come up with the funding sources.

The Department of Labor granted States and cities a 6-month grace period, as you know—October 15, 1985. If we were to make FLSA a working part of State and local governments' operations, we will need significantly more time than that.

Since most State legislatures are part-time endeavors, that extra time will allow legislators to meet and find the funds for compliance, as well as to amend or repeal the many substantive statutes which are in direct conflict with these provisions.

Many States and localities have collective-bargaining agreements with public employees and will require time to renegotiate those agreements, to bring them into compliance with *Garcia*.

Finally, most State and localities operate from a July 1 to June 30 fiscal year. Inasmuch as we're already in the 1985-86 fiscal year, it would make sense to allow us to implement FLSA, at a State level, beginning July 1, 1986, which is the first day of the 1986-87 fiscal year.

We also need to know that we're not incurring liability during this extended time period provided for compliance. Congress should make it clear that State and localities are not liable for overtime that might be accumulated during the time in which we are establishing the means of compliance. The effective date for the initiation of any private or Department of Labor action against governmental entities now in the process of complying, in my opinion, ought to be no sooner than July 1, 1986.

Last, the requirement that compensatory time be used within the same pay period that it is earned does not benefit State employees. Because of the nature of many State jobs, employees ought to have an option to accumulate comp time. This is particularly important to employee morale. Even though it results in no dollar savings to the State, this element of flexibility is an extremely significant one.

There should be a congressional recognition that certain types of governmental employees seem to be at odds with the workings of the Fair Labor Standards Act. When you look at the public safety employees, those routines simply do not lend themselves to punching in and out on a clock.

One does not have to be pro labor in order to recognize the importance of FLSA in many segments of American commerce; and, similarly, one does not have to be necessarily antilabor in recognizing that there are many instances in which FLSA ought not to be applied and ought not be applied in full.

The questions of how State and local governments run, how their budgets are managed, what control they retain over the services they provide their citizens ought to be the subject of very careful legislation.

I appreciate this opportunity to testify, and I will be happy to try to respond to any questions.

[The prepared statement of Governor Lamm follows:]

STATEMENT OF GOVERNOR RICHARD D. LAMM OF COLORADO
BEFORE THE LABOR SUBCOMMITTEE
OF THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES
July 25, 1985

Mister Chairman, members of the Subcommittee, I welcome this opportunity to discuss with you the U.S. Supreme Court decision in the case of Garcia v. San Antonio Metropolitan Transportation Authority. As you know, that decision reversed National League of Cities v. Usery and applied the Fair Labor Standards Act (FLSA) to the municipal transit employees of San Antonio, Texas. Of course, the implications of this decision touch almost every state and local employee across the country, as well as the taxpayers and governmental entities that they serve.

I am here today because Justice Blackmun, in effect, told the nation's governors to air this issue in this forum. In the majority opinion in Garcia, he wrote that "the principal and basic limit on the federal commerce power is that inherent in all congressional action -- the built-in restraints that our system provides through state participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated." I believe that Justice Blackmun was saying "Go see Congress, not the courts." So here I am.

We, at the city and state levels, have two choices if we are to comply with the broadest interpretation of the Garcia decision and maintain existing services: either pay current employees more or hire more employees. We will do what we can to manage our employees more efficiently, but when the 40-hour work week is over and the work that needs to be done isn't, something will have to give. And unless we lower the level or quality of services we provide for our citizens, it will undoubtedly cost more money to make city and state governments work.

That the budgetary impact of applying FLSA to cities and states would be extreme was not lost upon the Supreme Court as it came to its decision in Garcia. Justice Powell noted in his dissent, "The financial impact on States and localities of displacing their control over wages, hours, overtime regulations, pensions, and labor relations with their employees could have serious, as well as unanticipated, effects on state and local planning, budgeting, and the levying of taxes." The effects of this decision are serious and unanticipated. We cannot be expected to comply with such comprehensive federal regulation in a period of weeks or months when, with a stroke of the pen, the Supreme Court has substituted a federal perception of fair labor standards for those of the 50 states.

As I see it, the task of this Committee is to determine whether the costs of complying with FLSA should be imposed upon cities and

states at a time when we are already stretched to our budgetary limits. The issue is plain: the federal government, in this area and others, has created costly entitlements, but left it up to the states and localities to manage these programs and, in large part, to pay for them. Cities and states are staggered by the blow of their own increasing tax burdens; the federal government's decreasing role in helping to pay for the rights it creates may be too much for them to withstand. This trend, capped by the Garcia decision, makes those of us at the state level wonder if there is anything we can do to control the funds Congress commits on our behalf.

If there is a single challenge before this Committee, it is to correct the imbalance between federally created entitlements and states' and localities' limited ability to finance them. I believe that Congress should take this opportunity to reestablish that certain determinations are within the sovereign powers of the states. There are those who do not believe you will answer this challenge, including Justice O'Connor, who wrote in her dissent to Garcia, "With the abandonment of National League of Cities, all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." I believe that there is room for compromise and that you will accept a middle ground, so that the fiscal viability of state and local governments is not the victim of the Garcia decision.

Before I tell you what I think that middle ground represents, let me tell you what compliance with FLSA means for the State of Colorado. First, it is projected that across-the-board compliance could cost state government as much as \$10 to 15 million in the first year FLSA is applied. Our major cities will incur significant new costs of their own. At a time when more of the burden of financing services is being shifted to state and local governments, finding those extra millions will be particularly difficult. And we in Colorado don't have the option of deficit spending to effectuate FLSA compliance; our Constitution requires that the state budget be balanced every year.

Second, this new layer of federal requirements may adversely affect employee morale in many divisions of state government by limiting the choices many state employees have in being compensated. For example, employees in our Wildlife Division work long and hard in the summer months when access to the high country of the Colorado Rockies is possible. In the winter, when snow precludes access to many mountainous areas, these same employees count on having large blocks of compensatory time available for other pursuits. Under FLSA, however, they will not have this option, as "comp time" must be taken within the same pay period as it is accrued. Thus, FLSA compliance in certain instances will

diminish the value of public sector jobs by eliminating the option to choose leisure time rather than cash as a preferred form of compensation.

Third, approximately ten thousand employees of Colorado State Government are paid with federal dollars because of grants, contracts, or Congressionally enacted programs. These employees will also be subject to the FLSA overtime regulations, but there will be no federal dollars to pay for any overtime they work. When these employees do work overtime, the State will have to foot the bill. Even though states retain the option to refuse federal funds in the first place, everyone in this room knows that cities and states just can't afford to turn their backs on available federal dollars. The states will either have to settle for doing less with the same number of federal dollars or continue the level of service currently being rendered at new expense to local taxpayers.

Fourth, complying with FLSA is going to put severe stress on the public safety functions of state government. In Colorado, existing state statutes prohibit the payment of overtime to the State Patrol. If we are to pay overtime to our State Patrol and other state law enforcement officers, it will cost \$5 million a year, which is approximately 25% of the total personal services budget for our Department of Public Safety. This is a function of government that we can ill-afford to cut, but unless we are given some flexibility in the way we treat such employees, we may have no choice.

Thus, the question is, "How should Congress deal with these problems that are peculiar to state and local compliance with FLSA?" There are several legislative options for this Committee and the entire Congress to consider. First, and most obvious, is a total exemption for states and localities from the mandates of the Fair Labor Standards Act. What may be valuable intervention by the federal government in one sphere -- private industry -- may make no sense whatsoever in another sphere -- state and local government. The Supreme Court saw fit to treat states and localities just as they would have treated private litigants under this statute. In so doing, the Court abandoned much precedent that had treated "States as States" with legitimate interests which the Federal government was bound to respect, even though its laws are supreme. But Congress retains the authority to limit the extent of the entitlement found by the Court and ought to consider doing so.

An alternative to exempting states and localities from FLSA is for Congress to accept its financial share of imposing this burden on the states. I am enough of a political realist, however, to know that Congress is not in a mood or a fiscal position to start increasing its funding commitments to state and local governments. But since that is the case, I ask you to understand that the consequences of forcing states and localities to comply with FLSA is to require them to come up with the money that you cannot find. And our well is getting pretty dry.

If Congress does not provide this kind of relief to states and cities, it is critical that we be given enough time so that the plans for compliance can be drawn up in a comprehensive way and funding sources can be located to meet the added fiscal burden of compliance. The Department of Labor has informed us that most of its investigations will not begin until October 15 -- a grace period of six months after the date of final disposition of this case by the Supreme Court. If we are to make FLSA a working part of state and local governments' operations, we will need several more months to get regulations formulated, adopted, and implemented. Since most state legislatures are part-time endeavors for those who serve, that extra time will allow legislators to meet and find the funds for FLSA compliance, as well as amend or repeal substantive statutes that are in direct conflict with the provisions of FLSA. Moreover, many states and localities have collective bargaining agreements with public employees and will require time to renegotiate those agreements to bring them into compliance with FLSA and the García decision. Finally, most states and localities operate on a July 1 to June 30 fiscal year. Inasmuch as we are already in Fiscal Year 85-86, it would make the most sense to allow us to implement FLSA at the state level beginning in FY 86-87. Thus, the effective date for compliance by states and localities should be July 1, 1986.

We also need to know that we are not incurring liability during that extended time period provided for compliance. The

motion for rehearing in this case was denied by the Supreme Court on April 15 of this year, and states and localities have incurred potential liability for overtime that has not been paid since that date. Even though there will be no federal enforcement actions for several months, we may be subject to suit by individual state employees or a class of state employees at any time. Congress should make it clear that states and localities are not liable for overtime that might be accumulated during the time in which they are establishing the means for complying with FLSA, unless such non-compliance is willful. The effective date for the initiation of any private or Department of Labor actions against governmental entities now in the process of complying ought to be no sooner than July 1, 1986, the first day after the extended grace period.

Additionally, the requirement that compensatory time be used within the same pay period as it is earned does not benefit many state employees. Because of the nature many state government jobs, employees value the option to accumulate this "comp time." All of us prefer being able to determine, for ourselves and without the intervention of our employers, when we take time away from our job. This is particularly important to employee morale. Even though it results in no dollar saving to the state, this element of flexibility is an extremely significant one.

Finally, there ought to be a Congressional recognition that certain types of governmental employment do not lend themselves to

the Fair Labor Standards Act. I recommend exemption from FLSA of public safety employees whose routines do not lend themselves to punching out at five o'clock.

In conclusion, I urge you to avoid dealing with this issue as if it were any other political question before the Congress. In my opening remarks, I indicated that Justice Blackmun's majority opinion recommended that state and local officials bring their case to Congress. Justice Powell, in his dissent, warned that states and localities would face stiff opposition from traditional interest groups and that governmental entities would probably lose the battle. Specifically, he wrote, "we have witnessed in recent years the rise of numerous special interest groups that engage in sophisticated lobbying, and make substantial campaign contributions to some members of Congress. These groups are thought to have significant influence in the shaping and enactment of certain types of legislation. Contrary to the Court's view, a 'political process' that functions in this way is unlikely to safeguard the sovereign rights of the States and localities." (Emphasis added.)

I hope that Justice Powell is wrong. One does not have to be pro-labor in order to recognize the importance of FLSA in many segments of American commerce. Similarly, one is not necessarily anti-labor in recognizing that there may be instances in which FLSA ought not to be applied or ought not to be applied in full. I believe that states and localities, because of the unique "business"

in which they are engaged as well as the burden they have encountered in coping with increasingly costly entitlements imposed by the federal government, provide just such an instance. This is the time and the place for Congress to respond to the Supreme Court that certain issues are properly within the domain of States and localities, not the Federal government. The questions of how state and local governments are run, how their budgets are managed, and what control they retain over the services they provide to their citizens are not issues that ought to be subject to yet another scheme of federal regulation. And Congress can best make that point by swiftly enacting remedial legislation that will provide a buffer between this new entitlement program and the nation's cities and states.

Thank you very much for the opportunity you have given me to discuss this issue with you. I will be happy to answer any questions that you may have for me on this issue.

Senator NICKLES. Governor Lamm, thank you.

You mentioned the possible costs to the State of Colorado; was it \$20 million?

Governor LAMM. Yes. That's just actually the State government. I did not have time to accumulate all the local units of government; I am in the process of trying to do so.

Senator NICKLES. Have you already issued orders or something to try to comply with the *Garcia* ruling, back to April 15, or whenever?

Governor LAMM. Yes. We are moving toward compliance, but that last answer about the fact that moving toward compliance, even good faith moving toward compliance does not—it might give us protection with the Department of Labor, but it does not give us to those other liquidated damage suits that any employee can bring.

Senator NICKLES. Do you have any of those suits pending now?

Governor LAMM. I know of none in Colorado, but it is inevitable—believe me, it is inevitable.

Senator NICKLES. I share your concern, and I also hope that we will be able to do something. I mentioned, in my legislation, that we plan on moving the date back to the date of the Court ruling, which would eliminate that liability, if we get it enacted. Meanwhile, while we don't have it, you are accruing the potential liability, which was brought out by several of the panelists.

Senator Matsunaga, did you have any comments or questions?

Senator MATSUNAGA. No, no questions.

Senator NICKLES. Governor Lamm, thank you very much for your appearance before the Committee today.

Our next panelists are Al Bilik, executive director of the State and local division for the AFL-CIO; Peggy Connerton, chief economist for the Service Employees International Union, also from Washington, DC; and Harold Schaitberger, Legislative Director, Washington, DC, representing the International Association of Fire Fighters, and we welcome you to the committee.

Mr Bilik.

STATEMENT OF AL BILIK, EXECUTIVE DIRECTOR, STATE AND LOCAL DIVISION, PED, AFL-CIO, WASHINGTON, DC; PEGGY CONNERTON, CHIEF ECONOMIST, SERVICE EMPLOYEES INTERNATIONAL UNION, WASHINGTON, DC; HAROLD A. SCHAIBERGER, LEGISLATIVE DIRECTOR, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, WASHINGTON, DC

Mr. BILIK. My name is Al Bilik, and I appreciate the opportunity, on behalf of the AFL-CIO, Public Employee Department, to appear here today on this very important question. I speak for some 32 national unions that are part of the AFL-CIO, which represent in excess of 3 million organized public employees in the United States.

I guess a year ago a simple bus driver named Garcia did not know he would become so famous, or infamous, as some have suggested here this morning. But you have been impressed, I'm sure, just as I, by the statements by a very interesting array of public figures here today. But not only are they public leaders, they are

public employers, and it is not surprising that they would take a typical employer position on a matter of fair labor standards. The position is a negative one, as it has been for employers in the United States, public and private, throughout our history. And it's on that level that I would like to offer some comments, Mr. Chairman, if I may.

Our position, as the Public Employee Department, is a very simple one: we're pleased to be covered by the law; We should have been covered all along, and at this time we seek no changes in the law.

Historically, our department has been in the forefront of a 20-year struggle to convince the U.S. Congress that fair labor standards must also cover public employees. Arbitrary exclusion, which was the case for so many years, of 15 percent of our work force—the public sector—is, in our opinion, intolerable.

Morally, we add, if such standards are to be truly fair, they should apply to all workers, union and nonunion, without distinction. And it's unrepresented workers, particularly, who need the protection of a mandatory fair labor system so that they can avoid the inevitable coercion that will accompany any option, however dressed up or phrased, of alternative benefits—and I'm alluding here to the various suggestions about compensatory time.

Traditionally, although organized public workers make up today among the public employees about 40 to 45 percent throughout the country, they are represented very unevenly, in geographic terms particularly. But the total is in that area. Organized workers, by and large, can through collective bargaining protect themselves, so that coercion by an employer who is more interested, frankly, in having comp time worked than paying premium for overtime, can be discouraged or deterred.

Our concern here is with the millions of unorganized workers in the public sector who would be at the perhaps not so tender mercies of public employers if given the option of taking time off rather than being paid in cash. This has been the argument in favor of a requirement for cash pay from the inception of the Fair Labor Standards Act, as it applied to private workers, because of the fear that employers—many of whom are very nice, decent and law-abiding, but many who are not—would take advantage of their power relationship with an individual worker and somehow convince him or her to take time off rather than cash. That's the rationale for the presently written law, and one that we support.

From the standpoint of the Nation's economic health, premium pay for overtime work has traditionally been viewed as incentive to employers, it's true, to expand their work force rather than to concentrate on fewer employees doing more work, and working extended hours without premium pay.

With chronic unemployment in the United States today stuck at above 7 percent—that indicator is not moving at all, it certainly is not declining—I think we are in greater need than ever of the kind of job stimulus that the Congress had in mind 50 years ago when it enacted FLSA and that, indeed, motivated adherents of the 8-hour day a century ago. We've been fighting this struggle, at least figuratively for us sitting here, for a century. This is nothing new for American workers. Since 1938 successive Congresses have shared

our conviction that the national interest is served by the inclusion of the widest range of workers under the law.

In 1961 coverage was extended to employment in commerce, as well as traditionally in the production of goods for commerce. In 1966 amendments extended the act to large groups of previously uncovered workers, including a number of public employees; and that's almost 20 years ago. Numerous Federal workers were covered, especially those in hospital and related school activities, and in local transit. State and local government efforts to overturn this application of the law were rejected by the court in *Maryland v. Wirtz* back in 1968.

In 1974, Congress continued to broaden the scope of the law by mandating the inclusion of all Federal, State, and local public workers, passing the measure—please note the numbers—in the Senate by a vote of 71 to 19, and in the House by 345 to 50. This is not a judicial decision, made by five elderly jurists; this is a decision obviously carefully contemplated and worked out, and overwhelmingly supported by your compatriots in the Congress, in both Houses.

Federal and Postal Service workers have been covered since that time, but we know that State and local, as a result of the *National League of Cities* case in 1976, have not been covered. Now, of course, the Court has reversed itself, as we think it should have done, to finally apply that overwhelming vote of the Congress, as it was spoken in 1974.

There was useful legislative history made in 1974 that we should not ignore. It pointed out that State and local governments as employers were no different from any employer coming under the coverage of the law since 1938. They did argue extensively that their inclusion would impose insurmountable economic hardships—the same kind of thing we heard today. And there was work done at that time, and people are aware of it who represent the public employers.

The Labor Department, under Mr. Hodgson at that time, in a study that was commenced in 1971 in anticipation of the 1974 enactment, found, in its report, and I quote a few lines, "If a 40-hour Federal overtime standard were in effect at the time of the survey," which was 1971, "the premium pay required for these hours would have approximated 1 percent of the total weekly wage bill throughout the Nation for all public employees."

But 1 percent is an exaggeration because the report goes on to say that the actual impact of a 40-hour standard would have been less than 1 percent inasmuch as a substantial proportion of the employees already received premium overtime pay. In other words, there have been public employers in the United States who didn't wake up yesterday morning, or on February 19 of this year, because the Supreme Court spoke. Public employers in this country, going back 20 years or more, have of their own volition, or through bargaining of some kind with their workers, achieved a fair labor standard that approximates FLSA requirements, or even exceeds them. This has been going on.

Now, if the Labor Department found in 1971 that the costs of implementing the new law at that time would have been significantly less than 1 percent of the total payroll, then I would suggest to

you, given the development of collective bargaining, and even of a greater enlightenment among public employers, some of whom sat here today, that they actually went ahead voluntarily and did the right thing; that is, applied the Federal labor standards to their own employees. I think this is a very significant point which I hope the committee would keep in mind.

Congress did give special consideration in 1974 to certain concerns of the States and localities, and you will hear from Mr. Schaitberger about the firefighters particularly. There was a special consideration enacted into law at that time to take care of that problem, but the record demonstrates the consistent inaccuracy of employer predictions of economic ruin made prior to their coverage. The predictions proved to be unfounded, and we are convinced they remain equally unfounded today.

There will be, of course, some costs to public employers, those who have resisted the principle throughout of fair labor standards. It will cost them something; but I have a suggestion for that also.

We are convinced that any city or State which would have to increase its payroll as a result of the *Garcia* decision has, in fact, been exploiting its workers and should, at long last, very frankly, be required to provide the basic protection of the Fair Labor Standards Act to its employees.

Finally, one other observation: Many public employers, prior to *Garcia*, had met or even exceeded the standards of the Fair Labor Standards Act. Since *Garcia*, despite an early uncertainty at the Department of Labor, other public employers have moved quickly to cooperate with their unions in a voluntary effort to comply with the law. We know this from our own experience.

The Conference of Mayors, to its credit, early on urged its members to act promptly to comply. The Department of Labor issued a directive 2 months ago; the signals to public employers until now have been, as a result, firm and constructive and affirmative.

At this point, however, I think we run the risk that public employers may detect a new signal—if these hearings are drawn out, a signal that I am sure this committee does not intend, that may discourage early compliance by those who have not yet acted. There is practically no function that is performed by cities and states that are not also performed by Federal employees and by private enterprise, workers who are presently, and have been for years, covered by the Fair Labor Standards Act. In corrections work, waste collection, fire fighting, either Federal or private at this stage, they are all covered by the Fair Labor Standards Act. They are doing the work and they're getting paid for it at premium rates.

It was commented here—I'll conclude with this—that the Governor of Missouri fears that overtime will cause high turnover. Well, when you think about the fact that virtually every other position in our economy is covered by the Fair Labor Standards Act, with the few exceptions which were cited in earlier testimony and are so incidental as to be unworthy of comment, where would these workers go if they are so unhappy about the State of Missouri insisting that they get time and a half for overtime? They're going to quit their jobs, according to the Governor, but to go where to work? All the other jobs are already covered.

Finally—finally, finally, comp time, traditionally, has been an employer initiative. We should not be given credit for that through collective bargaining. Labor unions came on the scene in the public service when overtime pay was virtually unheard of because employers preferred to give time off, and usually at equal time rates. It was cheaper, more convenient for them, and they did not really concern themselves too much about the wishes of the workers.

We have sought, through unions, premium pay consistently. We've heard advice from employers today about how we ought to react, in terms of the workers we represent. If that's the case, I'll offer a little advice to management.

Overtime is a simple procedure, a mechanism which is in the full control of the employer. I know of no labor contract in the public sector that gives unions the opportunity to make the decision as to how much overtime will be worked, when and under what circumstances. It is a management prerogative.

My recommendation is, instead of worrying about the horror stories, emphasize that management ought to begin to manage, and I think the major portion of our problem would be resolved.

Thank you very much.

[The prepared statement of Mr. Bilik follows:]



Public Employee Department AFL-CIO

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Secretary-Treasurer

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Federal/Postal Division

AL BILIK
State/Local Division



STATEMENT

before the

LABOR SUBCOMMITTEE

COMMITTEE ON LABOR AND HUMAN RESOURCES

OVERSIGHT HEARINGS ON SUPREME COURT DECISION
GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

JULY 25, 1985

Mr. Chairman, members of the Subcommittee, my name is Al Bilik, and I am Executive Director of the State/Local Division of the Public Employee Department, (PED), AFL-CIO. I would like to thank the Subcommittee for providing us with this opportunity to present our views on the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority.

The PED, whose 32 affiliated international unions represent more than 3 million public employees at every level of government, unequivocally applauds the Court's decision which at last approved the 1974 Congressional extension of the minimum wage and overtime protections of the Fair Labor Standards Act to all state and local public employees.

Aside from our obvious interest in behalf of AFL-CIO union members, we asked to appear before the Subcommittee today for several reasons. Historically, the Public Employee Department has been in the forefront of a twenty year struggle to convince the U.S. Congress that "fair labor standards" must also cover public employees. Arbitrary exclusion of 15% of the total work force is intolerable.

Morally, if such standards are to be truly fair, they should apply to all workers -- union and non-union -- without distinction and without options. Unrepresented workers especially need a mandatory, fixed system to avoid the inevitable coercion that will accompany the the option, however phrased, of alternative benefits.

From the viewpoint of the nation's economic health, the premium pay required for overtime has throughout this century been viewed as incentive to employers to expand their work force rather than require fewer employees to work more hours. With the chronic unemployment indicator stuck above the 7% mark, we are in greater need than ever of the kind of jobs stimulant that the Congress had in mind fifty years ago.

Since 1938, successive Congresses have shared our conviction that the national interest is served by the inclusion of the widest range of employees under the FLSA and its minimum wage and overtime provisions. The legislative history of the Act

describes the steady expansion of FLSA coverage to ever increasing numbers of employees.

In 1961, coverage was extended to employment in enterprises engaged in commerce, as well as in the production of goods for commerce. 1966 amendments extended the Act to large groups of previously uncovered employees, including a significant number of public employees. Numerous federal employees were covered, as well as state and local public employees working in hospitals and related institutions, schools and institutions of higher education, and in local transit operations. State and local government efforts to overturn this application of the FLSA to their employees were rejected by the Supreme Court in Maryland et al. v. Wirtz, Secretary of Labor, et al.

In 1974, Congress continued to broaden the scope of the FLSA by mandating the inclusion of all federal, state and local public employees, overwhelmingly passing the measure by a vote of 71 to 19 in the Senate and by 345 to 50 in the House. Federal and Postal Service employees have been covered since that time. But most state and local public employees have been denied the basic protection of the statute since 1976 as a result of the Supreme Court's ruling that year in National League of Cities v. Usery. The Court of course has now reversed itself in the Garcia decision of February 19, 1985.

Nevertheless, there was useful legislative history made in 1974. Like every employer coming under the coverage of the FLSA since its original passage in 1938, state and local government employers argued throughout the legislative deliberations on the 1974 amendments, that their inclusion would impose insurmountable economic hardships and force significant layoffs.

During its consideration of the 1974 amendments, Congress gave particular and extended attention to the financial concerns of the states and localities. These concerns, then as now, focused on the overtime provisions of the Act, particularly as they apply to police and fire fighting operations. These state and local government employer concerns were thoroughly addressed through the provision of a longer

regular work period and other special treatment for fire fighting and law enforcement personnel.

The record demonstrates the consistent inaccuracy of employer predictions of economic ruin made prior to their coverage under the FLSA. State and local government employers had argued that the 1966 amendments covering several groups of public employees would result in enormous financial pressures and force layoffs. Their predictions proved to be unfounded, and we are convinced they remain equally unfounded today.

We are supported in this conviction by the findings of two of our affiliated unions, who appear as co-panelists and who will discuss the results of their preliminary investigations and estimated costs of FLSA coverage for their members. Further, most state and local public employers already provided their employees minimum wage and overtime protections equal to or better than those mandated by the FLSA. We are convinced that any city or state which will have to increase its payroll as a result of the Garcia decision has in fact been exploiting its workers and should at long last be required to provide the basic protections of the FLSA to its employees. Better late than never!

Senator NICKLES. Thank you.

Again, we have another panel, so I am going to ask all our panelists to keep your remarks within the 7 minutes.

Mr. Schaitberger.

Mr. SCHAITBERGER. Mr. Chairman and Senator Matsunaga, I am Harold Schaitberger, director of governmental affairs and Public Relations for the International Association of Fire Fighters, an AFL-CIO union.

Our international union represents some 150,000 professional firefighters, employed throughout the United States primarily by States and local governments.

We have submitted today a comprehensive statement for the record, and I will summarize that statement. I would like to say that our international union's position is based on an extensive communication network with our 1,800 local and State affiliates.

We have just concluded, in the last 45 days, 8 days of meetings around the country in 8 different cities with over 1,400 of our 1,800 affiliate presidents, to discuss FLSA coverage in detail, so I think we will be fully competent to speak in their behalf.

We are grateful for the opportunity to address you this morning concerning the importance of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority* which allowed the Fair Labor Standards Act to be applied to firefighters and other public employees, as Congress clearly intended when it passed the 1974 amendments to that statute.

Unfortunately, for the last 10 years, the will of Congress, as expressed in the 1974 amendments, has been frustrated, and public employees have been deprived of the basic protections of the law.

Regrettably, today there are some city and State officials who are unwilling to give their fellow public employees the same Fair Labor Standards that have been afforded so many other workers who are covered under the umbrella of the FLSA.

Historically, as each group of employers has been brought within the scope of law at various times, there has been a crescendo of familiar complaints that the act will result in financial ruin, the layoff of many employees and the like.

The record has shown these predictions to be inaccurate, as employers reluctantly conformed to the law, without any significant adverse effects. We are convinced that the same result will be reached here as the cities and States come into compliance with the FLSA.

The 1974 amendments were achieved only after careful, painstaking consideration was given by both Houses of the Congress especially with regard to the economic concerns voiced by local governments in the areas of law enforcement 118 and fire service activities.

Rather than paying overtime compensation for hours worked beyond the traditional 40-hour workweek applicable to other employees under FLSA, section 7(k) of the law enables a city or State to avoid any overtime payment to firefighters until such time as they work 212 hours over a 4-week period, if they so choose.

The establishment of these higher hourly standards and the exemption of smaller public agencies, under the 1974 amendments, adequately took into account the financial concerns of local government officials.

It is apparent that some States and cities are advocating legislative amendments, designed to sidestep the Court's recent ruling and disregard the will of Congress, as expressed by the overwhelming majority of senators and representatives in the 1974 amendment.

Simply stated, there is no basis now for further amending the law at the behest of public employers. Senator Schweiker said it best, when coverage was granted under the 1974 amendment to firefighters and police:

They are long overdue members of our society, and they should have been recognized some time ago for the role they perform as they risk their lives and limbs for us, and we have not even covered them up to this date.

This statement applies with even greater force in 1985.

The minimum wage standards contained in FLSA are not being challenged by public officials, it is the overtime provision that has raised the specter of huge costs and massive layoff. Their contentions, designed to create panic and a stampede to reverse the intent of the *Garcia* decision, are plainly unfounded.

Now, the scope and level of fire department operations are much different than they were a decade ago. The work load is heavier, the manpower complements have been reduced already through budget cuts, and the average work week has been shortened over the years. For these reasons alone, we doubt that there will be any kind of massive layoffs, threatened by a few city managers who desire legislative changes.

Municipal managers contend that the application of FLSA standards will cause an overtime cost, relatively speaking. When applied to firefighters—excuse me—more overtime costs, relatively speaking, when applied to firefighters and any other public sector job.

This may be true; if so, it means that more firefighters are scheduled to work more hours than a reasonable standard would suggest than any other occupational group.

But what are the facts? Firefighters around the country have work schedules which vary from an average of 40 to 56 hours per week. The one schedule that is most prevalent is that which averages 56 hours per week. The FLSA standard establishes a norm of 53 hours per week for firefighters. All hours worked beyond that number shall require overtime premium pay. However, the overtime premium will presumably be calculated at one-half of the regularly scheduled hourly rate. The regular hourly rate would, in most cases, be predicated on a 56-hour workweek; thus, most firefighters would only be eligible for scheduled overtime after they receive—and would receive 3 hours of only half-time pay for week. This would increase their salary some 2.7 percent.

However, the actual costs will be even less since hours paid for, but not worked, are excluded from the calculation. Anytime a firefighter takes a shift of paid leave during a work period, for example sick leave, annual leave, personal leave, or time off in lieu of a holiday, bereavement leave, et cetera, he would not be entitled to any overtime pay. This translated into an annual salary increase of only 1.7 percent.

On a national scale, it is estimated that about half of all publicly employed firefighters now are scheduled to work less than 53 hours per week; therefore, the total impact of FLSA on scheduled pay for firefighters has an increase of less than 1 percent. And we have worked out some calculations in our statement that we would ask you to review when you have that opportunity.

Those communities that have thoroughly examined their obligations have readily adopted a strategy to bring them into compliance. Some examples of municipalities that have already complied with the act are Fairfax County, VA; Woodside Fire District, CA; Milwaukee, WI; Casper, WY, just to mention a few.

In conclusion, the application of the FLSA to the Nation's public sector fire departments will only involve a marginal cost. It will not be catastrophic, as urged by some public officials. In the overwhelming majority of communities that pay a premium for overtime work, the added costs will not exceed 2 percent. Many fire departments are in compliance and face no additional costs.

In summary, we respectfully submit that there is no need to amend or delay the full application of the FLSA to public employers and their employees. We are confident that experience will show that public employers will be able to comply with the FLSA, despite their unfounded predictions of financial doom, as other employers have been able to do when they were incorporated under the statute.

In the 1974 amendments, Congress voted overwhelmingly to include virtually all public employees within the protection coverage of the FLSA, and the law, as it stands now, should be given a fair chance to work.

We thank you very much.

[The prepared statement of Mr. Schaitberger follows:]

STATEMENT OF HAROLD SCHAITBERGER

Director, Governmental Affairs and Public Relations
International Association of Fire Fighters, AFL-CIO, CLC

Before the Labor Subcommittee,
Senate Labor and Human Resources Committee



July 25, 1985

HAROLD A. SCHAITBERGER
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Mr. Chairman and Members of the Committee:

I am Harold Schaitberger, the Director of Government Affairs and Public Relations for the International Association of Fire Fighters, AFL-CIO, CLC ("IAFF"). The IAFF is a national and international labor organization representing over 150,000 fire fighters employed primarily by state and local governments.

I am grateful for the opportunity to address you this morning concerning the importance of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority allowing the Fair Labor Standards Act ("FLSA") to be applied to fire fighters and other public employees as Congress clearly intended when it passed the 1974 Amendments to that statute. As you know, in the Garcia case the Court overruled its decision in National League of Cities v. Usery and concluded that it was, in fact, constitutional for Congress to extend the minimum wage and overtime protections of the law to state and municipal government employers. Unfortunately, for the last ten years, the will of Congress as expressed in the 1974 Amendments has been frustrated and public employees have been deprived of the basic protections of the law.

Now, at long last, the fundamental minimum wage and overtime safeguards of the FLSA are fully applicable to fire fighters and other public employees.

Regrettably, today there are some city and state officials who are unwilling to give their fellow public employees the same "fair labor standards" that have been afforded so many other workers who are covered under the umbrella of the FLSA. Historically, as each group of employers has been brought within the scope of the law

at various times, there has been a crescendo of familiar complaints that it will result in financial ruin, the layoffs of many employees, and the like. The record has shown these predictions to be inaccurate as employers reluctantly conformed with the law without any significant, adverse affects.

We are convinced that the same result will be reached here as the cities and states come into compliance with the FLSA. The advantages of continued coverage of public employees under the FLSA far outweigh any minor difficulties perceived by the cities' managers and, therefore, there is no present need to amend the law, nor is there any basis whatsoever for postponing the already long-delayed implementation of the law.

In considering the question of why fire fighters deserve the current protections of the FLSA, it is important to understand the legislative purposes of the statute and why Congress deemed it essential to cover fire fighters under the 1974 FLSA Amendments.

When Congress originally enacted the FLSA in 1938, it declared that the public policy of this country was to establish and maintain minimum standards of living necessary for the health, efficiency and general well-being of workers. Consequently, it required employers to pay their workers a minimum hourly wage and to compensate them at the premium rate of time and one-half for hours worked in excess of the normal workweek.

The remedial and humanitarian purposes of the law have been clear for the last 47 years. With respect to the overtime sections of the FLSA, it is well known that the twofold purpose of the provisions is to fairly and fully compensate employees for the

burden of having to work long hours for the benefit of their employer, while at the same time encouraging employers to reduce the hours of work and to hire additional persons. Essential to the achievement of these goals is the financial cost imposed on employers for overtime work under the FLSA. Specifically, it was intended that employers who desire to limit their labor costs would avoid forcing their existing employees to work extra hours at the premium rate of pay and instead would employ additional workers at the straight time rate, thus expanding employment opportunities.

In recognition of the noble purposes of the law, Congress has steadily broadened the coverage of the law to include various groups of public employees. For example, in 1966, Congress amended the FLSA to extend its protective provisions to certain public employees of schools, transit systems and hospitals. Although there were outspoken protests from these employers who estimated that the FLSA would impose impossible economic hardships, they managed to bring themselves into compliance with the law without serious difficulty.

In 1974, Congress once again determined that the boundaries of the statute should be enlarged to encompass virtually all employees of state and local governments, including employees engaged in fire protection activities. The legislative development of the 1974 Amendments reveals that the members of Congress were sensitive to the economic concerns expressed by state and municipal governments, especially in connection with the overtime obligations that would be owed to police and fire fighters. Nevertheless, the

view shared by most members of Congress at the time was that these public safety employees deserved essentially the same benefits and protections of the FLSA that are afforded to other workers.

The 1974 Amendments were achieved only after careful, painstaking consideration was given by both houses, especially with regard to the economic concerns voiced by local governments in the areas of police and fire services. A compromise bill was eventually reached in conference between the Senate and the House which produced the unique provisions in Section 7(k) of the FLSA and the much higher hourly overtime standards applicable to law enforcement and firefighting personnel. Those standards for fire fighters today are 212 hours for a 28-day work period (53 hours for a 7-day work period). In other words, rather than paying overtime compensation for hours worked beyond the traditional 40-hour workweek applicable to other employees under the FLSA, Section 7(k) of the law enables a city or state to avoid any overtime payments to fire fighters until such time as they work more than 212 hours over a four-week period. In addition, under Section 13(b)(20) of the legislation, smaller public agencies with less than five employees engaged in fire protection activities were completely exempt from the overtime requirements. The establishment of these higher hourly standards and the exemption of smaller public agencies under the 1974 Amendments adequately took into account the financial concerns of local governments officials. With these compromises in mind, on March 28, 1974, the Senate approved the bill reported out of conference by the lopsided vote of 71 to 19 and the House adopted the measure by even a larger margin of 345 to 50.

The President signed the bill on April 8, 1984, with the intention that the FLSA would be applicable to most public employees on May 1, 1974 and to fire fighters and police on January 1, 1975. Of course, as I mentioned earlier, the state and local governments have largely avoided the application of the FLSA for a full decade in light of the Supreme Court's misguided ruling in the National League of Cities case -- a mistake which has finally been corrected by the Court in its Garcia decision on February 19, 1985. In light of this ten year reprieve, it is difficult to see the justice in the demands of certain municipalities that seek a further exemption from the law.

It is apparent that some states and cities are advocating legislative amendments designed to sidestep the Court's recent ruling and disregard the will of Congress as expressed by the overwhelming majority of Senators and Representatives in the 1974 Amendments to the FLSA. Simply stated, there is no basis now for further amending the law at the behest of public employers and to the substantial detriment of fire fighters who have waited long enough for coverage under the FLSA. Senator Schweiker said it best, when coverage was granted under the 1974 Amendments to fire fighters and police: "They are long overdue members of our society and they should have been recognized some time ago for the role they perform as they risk their lives and limbs for us and we have not even covered them up to this date." 120 Congressional Record 8767 (1974). This statement applies with even greater force in 1985.

Aside from the basic proposition that fire fighters deserve the same equitable treatment accorded other employees under the FLSA, we would be remiss if we did not respond to the statements of certain city and state representatives who have sought to accomplish their legislative goals by grossly exaggerating the financial impact of the FLSA's overtime provisions, especially in the area of fire services. It has become almost a tradition whereby employers who wish to be relieved of their statutory obligations attempt to paint a picture of financial doom which, when tested by time, proves to be a picture that is divorced from reality.

In the sections below we show that the projections of the local government officials simply do not square with the facts.

THE ECONOMIC COSTS OF COMPLYING WITH THE FLSA ARE MINIMAL

The minimum wage standards contained in the FLSA are not being challenged by public officials. Apparently they believe that state and local government employees are paid at rates that exceed the minimum. We, in the IAPF take no consolation in that assumption, although we may concur with it. Regrettably, in those areas of the country where low annual salaries and lengthy workweeks are prevalent, a number of fire fighters receive hourly rates that are barely above the prescribed minimum of \$3.35 per hour.

It is the overtime premium provisions that have raised the specter of huge costs and massive layoffs. These contentions, designed to create panic and a stampede to reverse the intent of the Garcia decision, are plainly unfounded.

A. Placing the 53-hour Per Week Standard in Perspective

As I mentioned earlier, no other worker covered by the FLSA has to work as many hours as the fire fighter before becoming eligible for overtime premium pay under Section 7(k). Under that provision, a fire fighter must work almost one-third more hours than the norm of 40 hours per week which applies to workers in the private sector and most others in the public sector.

The 53-hour per week standard is not new. It is based on a study of actual hours worked by fire fighters engaged in fire suppression activities in 1975. The study was conducted by the Bureau of the Census and the Department of Labor and reflects the norm that existed ten years ago. But now the scope and level of fire department operations are much different than they were a decade ago. The workload is heavier, the manpower complements have been reduced and the average work week has been shortened.

It is common practice today for fire fighters to be trained as Emergency Medical Technicians or Paramedics, contrary to the experience of the 1970's. Firefighter/EMTs are first responders to all incidents at which emergency medical care may be required. As a result, the number of actual emergencies to which fire fighters now respond has increased dramatically over prior years. Considering the dual roles, the fire fighter's treatment under FLSA appears ironic, if not contradictory. The fire fighter who is cross-trained as an EMT and responds to fires and non-fire related emergencies in either or both capacities is subject to the unique provisions of Section 7(k) and is not eligible to receive overtime pay until he works more than 53 hours a week of 212 hours over a 28-

day period. Yet, the EMT working in a separate municipal department, fulfilling one important role but not two, is eligible to receive overtime premium pay after only 40 hours per week or 160 hours over a 28-day period.

In addition, fire fighters today have the responsibility of resolving situations involving a multiplicity of hazardous materials that didn't exist a decade ago; they conduct more fire inspections requiring complex knowledge of a variety of toxic substances; they spend more time in public information campaigns, etc. Their workload -- and productivity -- per shift has increased substantially and the knowledge and skill requirements of the job have kept pace with the growth in technology.

This has all occurred during a period when fire departments have scaled back available manpower well below the levels which prevailed only a decade ago. We have experienced a period of rising demand for fire services with a shrinking work force to meet those demands. Because the fire fighting work force in most cities has been reduced to the bare minimum, it is extremely unlikely that the FLSA will cause any significant layoffs without placing the public safety in serious jeopardy. For this reason alone, we doubt that there will be the kind of massive layoffs threatened by a few city managers who desire legislative changes.

Finally, since 1975 many departments have reduced the scheduled hours of work for fire fighters. Such cities as Phoenix, Houston and Seattle, to name a few larger cities, as well as numerous smaller communities, have recognized the need to reduce the fire fighters' workweek to offset the expanded workload.

When all these factors are considered, a standard of 53 hours per week seems harsh. If a survey were taken this year, it would surely produce a lower norm than 53 hours per week. Under the circumstances, an attack on the current FLSA standard as it applies to fire fighters is not only unreasonable and without merit, it is unconscionable. If anything, the FLSA hourly standard should be lowered to reflect today's realities, not abolished as proposed by some public officials.

B. The Adoption of a 53-hour Standard Is Not Costly

Municipal managers contend that the application of the FLSA standards will cause more overtime costs, relatively speaking, when applied to fire fighters than to any other public sector job. This may be true. If so, it means that more fire fighters are scheduled to work more hours than a reasonable standard would suggest than any other occupational group.

What are the facts? Firefighters around the country have work schedules which vary from an average of 40 to 56 hours per week. The one schedule that is most prevalent is that which averages 56 hours per week.

The FLSA standard establishes a norm of 53 hours per week for fire fighters. All hours worked beyond that number (or 212 hours over a 28-day period) shall require overtime premium pay. However, the overtime premium will presumably be calculated at one-half of the regularly scheduled hourly rate. The regular hourly rate would, in most cases, be predicated on a 56-hour week. Thus,

most fire fighters who would be eligible for scheduled overtime pay would receive 3 hours of half-time pay per week. This would increase their salary by 2.7%. The formula is:

3 overtime hours divided by 56 scheduled hours x .5 premium pay = 2.68% or,

\$6 hourly rate x 56 hours = \$336 (regular weekly pay)
 \$3 half-time premium rate x 3 hours = \$9 (increase)
 \$9 divided by \$336 = 2.68%

However, the actual cost will be even less since hours paid for but not worked are excluded from the calculation. Any time a fire fighter takes a shift of paid leave during a work period -- i.e., sick leave, vacation, personal leave, time-off in lieu of holiday, bereavement leave, etc. -- he will not be entitled to any overtime pay.

It is expected that most work periods will be either 21 or 27 days in duration. If the work period is 21 days, there will be 17.4 work periods a year (365 days divided by 21 = 17.4); if 27 days, there will be 13.5 work periods (365 days divided by 27 = 13.5).

It is fair to assume that in at least 5 of the 13.5 work periods or 6.5 of the 17.4 work periods fire fighters will, on average, utilize some form of leave. That is, they will lose their eligibility for overtime about 37 percent of the time or conversely they will receive it 63 percent of the time.

This translates into an annual average salary increase of 1.7% ($2.68 \times .63 = 1.69$). This is a very modest cost indeed -- and it only applies to those fire fighters currently scheduled to work an average of 56 hours per week. On a national scale, it is estimated that about half of all publicly employed fire fighters now

are scheduled to work less than 53 hours per week. Therefore, the total impact of the FLSA on scheduled pay for fire fighters is an increase of less than one percent ($1.7\% \text{ divided by } 2 = 0.85\%$). This is a negligible amount.

It should also be pointed out that fire department costs do not comprise a large share of municipal expenditures. According to the U.S. Bureau of Census, expenditures for fire protection constitute only 6.6% of total general city expenditures.¹ The proportion ranged from a low of 4.2% in cities of a million or more in population to a high of 9.0% in municipalities with populations from 50,000 to 99,999.

The total expenditure for fire protection in all municipalities throughout the country for 1982-83 was \$5.941 billion. If we assume wages comprise 85 percent of fire protection costs, then the total wage cost was \$5.050 billion. If that is increased by 1 percent as the result of the application of the FLSA standards, the total nation-wide cost of the increase would be only \$50.5 million. This is less than some large cities alone have claimed would be the increased cost to them for complying with the new standards.

The requirement to pay overtime for all hours worked over an average of 53 per week should not present a costly problem to any municipality. As shown earlier, it is relatively inexpensive for cities currently paying an overtime premium for all hours worked

¹ U.S. Department of Commerce, Bureau of the Census, City of Government Finances in 1982-83, p. 3.

over an average of 56 per week. For those cities whose trigger for paying an overtime premium is already less than 53 hours, there is likely to be no cost in complying with the FLSA. At worst, they may have to adjust their scheduling and work periods.

Indeed, those communities that have thoroughly examined their obligation have readily adopted a strategy to bring them into compliance. Two examples are illustrative.

Fairfax County, Virginia simply adopted a 28 day work period and maintained a work schedule averaging 56 hours a week. Considering the anticipated usage of paid leave, the County expects its increase in costs to be less than 2 percent.

Casper, Wyoming negotiated a different arrangement with its IAFF local. In a recently concluded collective bargaining session for a two-year contract, the City agreed to pay all fire fighters 3 hours of premium pay per week for every pay period throughout the year. Fire fighters will receive the premium overtime pay whether they take paid leave or not. This provision, obviously, not only meets but exceeds the requirements of the FLSA. On the other hand, it eliminates administrative costs (i.e., additional recordkeeping) which the City would otherwise incur.

The union acknowledged that this provision would increase Casper's fire department payroll costs by about 2.7%. This was taken into consideration in negotiating an across-the-board increase. The parties agreed to another 2.7% bringing the total increase in pay for Casper's fire fighters to 5.5% since the across-the-board increase compounds on top of the FLSA adjustment.

These examples demonstrate that local government can readily absorb the cost of complying with the FLSA and, where necessary, this cost will be taken into consideration in future collective bargaining regarding wage increases.

C. The Overtime Premium May Be Costly to Some Public Employers Who Have Fire Fighters Work Extended Hours

The only public employers who may encounter significant costs are those who pay no premium now for overtime work, no matter how that overtime is currently defined. In effect, they haven't yet recognized the concept of overtime at all.

These employers fall into two categories.

First, there are the cities who pay straight time pay for all hours worked no matter how outrageously large that number may be. For example, there are a number of fire departments that claim to have a work schedule that averages 56 hours per week. In reality, however, they routinely schedule fire fighters to work an extra shift every week or every other week on a straight-time pay basis. This is called "scheduled" or "voluntary" overtime as opposed to emergency or unscheduled overtime. In effect, then, the fire fighters are scheduled to work an average of 68 or 80 hours a week, not 56, and there is no real overtime.

This gimmick produces tremendous savings for these cities, but causes fire fighters to work an inordinate number of hours. It actually costs the cities less to work the fire fighters on "overtime" than their regular hours. For instance, the cities make no pension contribution for these so-called overtime hours.

Obviously this practice holds down hiring. Cities find it cheaper to schedule fire fighters to work as much overtime as possible rather than hire additional workers.

Cities who engage in this practice are doing precisely what the FLSA was intended to prevent when it was enacted in 1938. The IAFF not only believes this practice is contrary to the intent of the FLSA but that it is unsafe for fire fighters to routinely work so many hours on a regular, long-term basis.

The only reason the adoption of the FLSA standard may be costly to cities who follow this practice is that they have never recognized the principle that overtime work, no matter how defined, justifies some form of a premium. The issue confronting these cities is not the overtime standard, but rather the notion of a premium for working overtime. Yet, absent a premium, the definition of overtime is meaningless.

Their problem is that they are understaffed and wish to remain that way. The application of the FLSA will force them to reconsider that practice, as it was originally designed to do.

The second category includes municipalities that pay for overtime on a straight-time basis but give it in the form of compensatory time off rather than money. This practice is not quite as detrimental to the best interests of fire fighters, since -- if fire fighters are, in fact, given the opportunity to use compensatory time -- they are not required to work an inordinate number of hours on a regular basis. However, this practice is unfair. It does not recognize that overtime work is an inconvenience to the worker, interferes with family and social

obligations, and is tiring. It does not acknowledge that overtime inherently implies a premium for working it.

Oftentimes, too, fire fighters never get an opportunity to use the compensatory time that has been built up. Accumulated leave time creates a future liability for a city. That liability is better paid in the year in which it is incurred.

To the extent some fire departments have adhered to this practice and have not recognized the concept of a premium payment for overtime worked, even if paid in compensatory time off, they may incur higher costs than those cities that have adopted the standard procedure of premium pay for overtime. However, this cost does not grow out of the application of the FLSA to public sector fire fighters, but rather should be attributed to their own mistake of not following generally accepted practices.

D. Compensatory Time Off vs. Pay

Section 7(k) of the FLSA clearly prescribes that premium pay be paid fire fighters for all hours worked over 53 hours a week or 212 hours over a 28-day period. There appear to be only two exceptions. First, it is acceptable if the compensatory time off is taken within the same work period in which it is earned. Second, it is permissible, for those fire departments whose regular hours are less than 212 over a 28-day period to use compensatory time off for those overtime hours between the lesser number and 212.

The question has been raised whether further exceptions should be granted. The IAFF concedes there may be instances when compensatory time-off may be an appropriate substitute for pay. The current flare up of forest fires in the Western states may present a

situation where compensatory time off may be a fully or partially acceptable response. If necessary, however, there is sufficient latitude in the law, particularly with respect to Section 7(k), to allow regulations of the Department of Labor to be developed to address this issue in an appropriate way. It does not require an amendment to the law.

In any case, it is the IAFF's position that the principle of premium pay for overtime worked must not be undermined by any exceptions. That is, if compensatory time off is to be considered an acceptable payment under properly defined circumstances, it must be accrued on a premium not on a straight-time basis.

Conclusion

The application of the FLSA to the nation's public sector fire departments will only involve a marginal cost. It will not be catastrophic as urged by some public officials. In the overwhelming majority of communities that pay a premium for overtime work, even if overtime does not become effective until more hours are worked than specified by the FLSA, the added cost will not exceed 2 percent. Many fire departments are already in compliance and face no additional costs.

Only those few municipalities that have avoided the fundamental principle of premium pay for overtime work will potentially be confronted with appreciable cost increases. There is no reason to exempt all public employers from the law because a few may be faced with sizeable costs caused by their own decision to work their employees for excessively long hours. Had they followed the standard practice of most city fire departments, they would not

now be complaining so loudly about the perceived adverse impact of FLSA. Contrary to the long-established purposes of the FLSA, these communities have worked their fire fighters for inordinately long hours at a straight-time rate, instead of hiring additional personnel to provide the level of fire protection service required by the public interest. It is time they were brought into the mainstream under the impetus of the FLSA.

In sum, we respectfully submit that there is no need to amend or delay the full application of the FLSA to public employers and their fire fighters. We are confident that experience will show that public employers will be able to comply with the FLSA despite their unfounded predictions of financial doom, as other employers have been able to do when they too were incorporated under the statute. Indeed, any minimal burden created by the FLSA on some cities will encourage them to reduce the hours of work and to hire additional persons -- a result which is precisely consistent with the overall purposes of the statute. The law was well named in 1938 -- the Fair Labor Standards Act -- and we believe these same fair labor standards should have equal application to public sector employees as it has had for private sector employees. In the 1974 Amendments, Congress voted overwhelmingly to include virtually all public employees within the protective coverage of the FLSA, and the law as it stands now should be given a fair chance to work.

Senator NICKLES. Thank you very much. We appreciate your comments.

Ms. Connerton.

Ms. CONNERTON. I am Peggy Connerton, chief economist of the Service Employees International Union.

Our union represents about 525,000 non-Federal public employees who work for State and local governments and school districts, as well as other low-paid workers in the private sector.

I would like to emphasize at the outset that SEIU strongly supports the extension and prompt enforcement of the Federal wage and hour laws to State and local workers.

Millions of State and local government employees have yet to achieve even the most basic rights—the right to join a union. I think, if you exclude teachers who are already exempt from the FLSA, the percent of State and local workers who are currently organized is about 30 percent. Many of these workers aren't adequately protected under State law.

In comparison, many of SEIU public sector contracts provide strong overtime benefits which exceed the minimum FLSA standard.

There has been a lot of discussion this morning about the issue of employee morale, so I would like to make this point, and that is that our members stand squarely behind the principle that public sector workers deserve the same fair labor standards that have been applicable to so many other workers.

Now, some public employers argue that the FLSA is not necessary to protect public employees, who already enjoy attractive benefits. Regrettably, examples of wage and hour policies failing to meet bare minimum overtime standards are abundant, and some examples are listed in the testimony.

A host of State and local officials are raising the prospect of budget busting because of the Supreme Court's ruling. Even before the ink was dry, they raised the specter of heavy financial burdens in the billions of dollars, with States forced to raise taxes, lay off workers, or otherwise cut services to offset the higher costs.

Unfortunately, any desire to understand the true impact of public policies has become hostage to "chicken-little" politics, now the standard way to accomplish legislative agendas.

None of these estimates are based on any sort of statistical survey, and I think we go through, in the testimony, some of the internal inconsistencies between individual State and local government, estimates that are not explained by overtime pay provisions, wage scales or other personnel practices.

Let me just say that we recently completed a study of the impact of FLSA coverage on public employers that addresses directly these claims. We were, frankly, interested in what ways our membership would be affected.

We surveyed contracts representing nearly 70 percent of our public sector workers. The survey also covered a wide variety of jobs in both the State and local sectors. Our analysis says that the predictions of financial doom are simply not true.

Increased overtime benefits for all SEIU locals will cost \$2.8 million to \$3.3 million this year out of a total \$8.5 billion in wages paid.

We also look at the benefits of FLSA coverage for other state and local workers. Nationwide, State and local employees can expect to receive this year about \$210 to \$300 million more in their paychecks as a direct result of FLSA overtime coverage. The relative impact is larger here because many public employees work in States where collective bargaining does not exist or is severely limited.

In addition, firefighters, a group not heavily represented in SEIU contracts, would receive more overtime pay. The bottom line is that State and local government can, generally, absorb the higher compliance costs. At most, they represent sixteen-hundredths of 1 percent of their \$184 billion wage bill, so it's a very small financial impact.

Now, some State and local officials have jumped on the popularity of compensation time among some public employees as a vehicle for securing an exemption from Federal wage and hour laws. Overall, for our members, we estimate that about 40 percent of all overtime hours for State and local employees are reimbursed in compensation time. Now, this number doesn't reflect the popularity of compensation time, per se, because not all of it is voluntarily given.

The FLSA, in our view, retains a number of administrative flexibilities in the use of time off. Someone mentioned this morning that timeoff plans would not be easily adopted to the public sector; however, it is a way of keeping—it's really a flextime schedule, that many of our members are seeking to implement this summer during collective bargaining.

In addition, firefighters and police, where employers specify a 7(k) exemption, may take any overtime hours earned between the standard workweek in their contract and the 7(k) limit in the form of comp time off.

The FLSA also provides an exemption for salaried employees who have sufficient work responsibilities. This means that many administrative and professional employees may continue their comp time practices as in the past.

Finally, some of our locals requested that we send them some language on how to negotiate liberal leave policies to enable them to collect overtime in cash and take leave without pay at a later time.

Some employers have failed to take advantage of these flexibilities and, in fact, they are overreacting in the other direction. Michigan, for example, is attempting to eliminate all flextime for their employees, including those who are exempt from the FLSA, exempt administrative and professional employees.

Nevertheless, the question arises as to whether further exceptions should be granted. Along this line, there are several points to make: First, comp time is not a cost issue.

I was happy to hear Governor Lamm mention that eliminating comp time would result in no cost savings.

In addition, we believe strongly that the principle of premium pay must not be undermined by any exception. Senate bill 798, for example, would decrease worker protections by allowing 1-for-1 compensatory time off.

Finally, in today's politically charged atmosphere, with State and local governments in a full-court press to secure an exemption, we cannot support any legislation amending the FLSA at this time.

SEIU does have—does urge the Department of Labor, which is currently proceeding, frankly, at a snail's pace, to clarify certain regulatory issues that may be of legitimate concern to State and local governments, to begin reviewing their regulations.

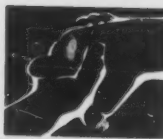
I heard the issue of volunteers come up—these are regulatory matters which the Department of Labor should be handling at this point, and I understand that they are not proceeding very swiftly on these matters. So, in short, we believe that there's no need to amend or delay the full application of the FLSA.

Fair overtime pay is just pure and simple economic justice, the economic justice that our members have always stood for and fought hard to achieve.

Thank you.

[The prepared statement of Ms. Connerton follows:]

**SERVICE
EMPLOYEES**
INTERNATIONAL UNION, AFL-CIO, CLC



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TESTIMONY OF THE

SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO, CLC

BEFORE

THE HONORABLE DON NICKLES
CHAIR

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR & HUMAN RESOURCES
U.S. SENATE

July 25, 1985

"Impact of FLSA Coverage on State and Local Government Employees"

SUBMITTED BY:

Peggy Connerton
Chief Economist
Service Employees International Union, AFL-CIO, CLC

Statement of Peggy Connerton
Chief Economist
Service Employees International Union, AFL-CIO, CLC

I am Peggy Connerton, chief economist of the Service Employees International Union. On behalf of our International President John J. Sweeney and the 850,000 members of SEIU, I appreciate the opportunity today to share our views on the coverage of state and local workers by the Fair Labor Standards Act. Our union represents 525,000 non-federal public employees who work for state and local governments and school districts.

I'd like to emphasize that SEIU strongly supports the extension and prompt enforcement of federal wage and hour laws to state and local workers. Millions of state and local government employees have yet to achieve even the most basic rights -- the right to join a union and to negotiate regarding their wages, hours, and working conditions. Another basic right denied some of them is that of "fair and full" compensation for long hours at work, at least equal to that which private sector workers enjoy. In comparison, many of SEIU's public sector contracts provide strong overtime benefits which exceed minimum FLSA standards.

Our members stand squarely behind the principle that public sector workers deserve the same "fair labor standards" that have been applicable to so many other workers. Above all else, this equity demands that a worker not be asked to work long hours for low pay in order to subsidize an employer, whether that employer is engaged in private business or in government business.

Some public employers argue that the FLSA is not necessary to protect public employees, who already enjoy attractive benefits under a sophisticated management. Regrettably, examples of wage and hour policies failing to meet "bare minimum" overtime standards are abundant. Scheduled or "voluntary" overtime work at straight-time pay in Texas, extra compensation only for weekends and holiday work in Georgia, 63 hour regular workweeks before overtime starts for fulltime firefighters at some California state hospitals, managers that prevent employee from taking time off earned for extra work...the list of overtime abuses goes on.

A host of state and local officials are raising the prospect of budget-busting because of the Supreme Court's ruling. Even before the ink was dry, they raised the specter of heavy financial burdens -- in the billions of dollars -- with states forced to raise taxes, layoff workers or otherwise cut services to offset the higher costs. The International City Managers Association recently put the cost increases at up to \$1.5 billion annually for counties and cities to bring police, firefighters, and professionals into compliance. Other estimates -- \$350 million for California alone or \$3 billion nationally -- simply adjust a 1974 cost projection of extending FLSA coverage to state and local workers for inflation. These estimates are highly speculative: shaky arithmetic made to substitute for statistically-valid surveys of current overtime practices and of any adjustments needed to comply with FLSA law.

Unfortunately, any desire to understand the true impact of public policies has become hostage to "chicken-little" politics, now the standard way to accomplish otherwise unpalatable legislative agendas.

Today's predictions of financial collapse and other budgetary hype are thin-disguises for the real hidden motive behind state and local government pressure to secure an exemption from FLSA laws: their contempt for the principles of federalism and equal treatment of employees, whether public or private.

Let's look at the facts. Both San Francisco and the District of Columbia have roughly the same number of public employees. Whereas San Francisco with fewer police and firefighters projects nearly \$50 million in compliance costs, Washington, D.C. with greater numbers of police and firefighters estimates only one-fifth that amount.

New York City puts its annual cost of compliance at \$50 million for its 211,000 employees. Yet, the city of Los Angeles which has an equal percentage of police and firefighters, but only one-fourth as many employees, claims its financial burdens will be nearly triple New York's. Interestingly, in their testimony last month before the Joint Economic Committee they could not account for \$98 million in FLSA-imposed compliance costs.

State-by-state estimates show similar discrepancies. The state of California estimated that the cost of converting compensation time to cash could cost about \$30 million or \$211 per employee. The bulk of the costs went to pay 3,400 fire suppression aides. Yet, Minnesota projects the same per capita cost, despite the fact that there are only 450 firefighters in its Forestry Department and they have shorter work schedules.

These inconsistencies are not easily explained by differences in overtime pay provisions, wage scales, or other personnel practices. We know because we represent many workers in these localities and have looked at the

overtime standards. Instead, these discrepancies reflect a failure to do some basic homework -- to understand clearly the range of options available to comply with FLSA law.

The ICMA estimates are equally flawed. They do not take into account prevailing pay practices for police. Yet, less than 1 percent of our police officers, for example, receive overtime at less than time and a half their hourly rate. Also, most police get overtime after a 40 hour workweek, which is less than the FLSA's minimum 43 hour standard.

The annual costs for firefighters on a 56 hour work schedule incorrectly assume that workers will get 3 hours of overtime weekly. Yet, workers often take paid leave (i.e., annual leave, sick leave, holidays, etc.) which do not count as hours worked under the FLSA for purposes of earning overtime.

Moreover, between 40-60 percent of their economic impact is attributed to professionals where they have no survey data at all on employees currently working overtime at premium pay or on the likely numbers who are exempt from FLSA standards. Most importantly, these and other estimates do not account for the fact that compensation time costs money: employees get paid leave, often at time and a half for extra work, and so it creates a liability to cities and counties. The bulk of the estimates inflate costs simply by ignoring adjustments in work schedules, pay schedules or work efficiencies introduced to achieve compliance.

SEIU recently completed a study of the impact of FLSA coverage on public employers that directly address these claims of financial hardship. We surveyed contracts representing nearly 70 percent of our public sector members. The survey also covered a wide variety of jobs in both the state and local sectors.

The SEIU analysis says it is simply not true -- increased overtime benefits for all SEIU locals will cost \$2.8 million to \$3.3 million this year, out of a total \$8.5 billion in wages. The bulk of the new overtime benefits will go to professionals in state employment and local police.

Our study also shows that the cost to individual public employers is generally a fraction of a percent and at most 2.5 percent of wages. The only public employers who may face significant costs are those who pay no premium now for overtime work.

SEIU also looked at the benefits of FLSA coverage for other state and local workers. Nationwide, state and local employees can expect to receive this year about \$210 million - \$290 million more in their paychecks as a direct result of FLSA overtime coverage. The relative impact is larger here because many public employees work in states where collective bargaining does not exist or is severely limited. In addition, firefighters, a group not heavily represented in SEIU contracts, would receive more overtime pay.

The bottom-line is that state and local governments can generally absorb the higher compliance costs. At most, they represent .16 of one percent of their \$164 billion wage bills. (We have attached a more detailed summary of the study.)

States and localities certainly have the budgetary resources to manage these minimal overtime costs. In the year just ended, for example, total state surpluses were \$5.3 billion.

In short, we need to call the budgetary hysteria for what it really is: a smoke-screen designed to stampede Congress into rolling-back the protections that are finally bringing state and local workers in line with federal and private sector workers. The real cause of any fiscal problems at the state and local levels is the proposed 18 percent cutback in federal

aid to state and local governments by the Reagan Administration, not FLSA coverage.

Some state and local officials have jumped on the popularity of compensation time among some public employees, a practice limited by the FLSA, as the vehicle for securing an exemption from federal wage and hour laws. Compensation time is a practice by which state and local governments pay for overtime by giving time off rather than cash.

We recognize that compensation time is widespread among some public sector workers. Over 40 percent of our public sector contracts covering 62 percent of our public sector workers call for compensation time as an option. Overall, we estimate that about 40 percent of all overtime hours for state and local employees represented by SEIU are reimbursed in compensation time.

The FLSA retains a number of administrative flexibilities in the use of time off. Employees may take compensatory time during the same workweek. Thus, 4-10 hour shifts, or other variants around the 40 hour workweek, would be possible.

Additional flex-time schedules, which many clericals desire, would also be possible. This is because an employer can comply with the FLSA by instituting a "time off plan" that allows employees to take one and a half time off for each hour of overtime worked during the same pay period. Time off plans are readily applied to unscheduled overtime as well. All that is necessary is to ask employees before working overtime whether they prefer cash or time off before the end of the pay period and to keep the appropriate records.

Firefighters and police, where employers specify a 7(k) exemption, may take overtime hours earned between the standard workweek in their contract and the 7(k) limit in the form of compensatory time off.

The FLSA also provides an exemption for salaried employees who have sufficient work responsibilities. Thus, certain administrative and professional employees may continue their compensation time practices as in the past.

Finally, our locals can also negotiate liberal leave policies to enable employers to collect overtime in cash and take leave without pay. According to our locals, employees who usually take extra vacations or go hunting with saved compensation time would find this option potentially attractive.

Some employers have failed to take advantage of these flexibilities. In fact, they are over-reacting in the other direction. Michigan, for example, is attempting to eliminate all flex-time for their employees, including FLSA-exempt administrative and professional employees. Furthermore, there is sufficient leeway to accommodate non-exempt employees as well.

Nevertheless, the question arises as to whether further exceptions should be granted. Along this line, there are several points to remember. First, compensation time is not a cost issue. In economic terms, compensation time paid at a one and a half rate and overtime in cash are monetarily equivalent. Compensation time imposes a future liability on city and county managers, but most time earned is spent by employees in the same fiscal year. For example, nearly 98 percent of our public employees who work under contracts offering time off have a maximum on the hours put in the bank or on the time for using the hours saved. The time limit is the more frequent provision and is generally 6 months or less. Employers also raise the concern that higher cash outlays will force them to cut public services. In this regard, it is important to remember that paying for overtime through compensatory time off is also a reduction in services.

SEIU also strongly believes that the principle of premium pay must not be undermined by any exceptions. S.798 introduced in the Senate, for example, would decrease worker protections by allowing one-for-one compensatory time off, which is less than the current FLSA standard. And S.798 applies this new standard to private sector as well as public sector workers.

In today's politically-charged atmosphere, with state and local governments in a full-court press to secure an exemption, we cannot support any legislation amending the FLSA. We believe strongly that the concepts of fairness and equity demand that the FLSA apply to state and local workers as it does to workers in the private sector, providing a foundation that assures all workers a right to decent wages and hours of work.

SEIU urges the Department of Labor to expeditiously enforce the law against those public employers who refuse to come into compliance by October 15, 1985. Strong actions demand more inspectors because the inclusion of over 7 million non-exempt state and local government workers expands the FLSA-covered workforce by 8 percent. In addition, investigation time per case will rise because the average size of a government department exceeds that of a private establishment. Despite these caseload trends, the current DOL budget calls for a decrease of 15 inspectors next year, from 1,471 to 1,456. In addition, the Department apparently does not intend to set up any temporary priority system to investigate complaints by public workers against state and local employers. These early signs of a weak enforcement posture by the Department of Labor are alarming indeed.

The Department of Labor is also proceeding at a snails pace to clarify certain regulatory issues that may be of legitimate concern to state and

local government officials. These may include, for example, overtime standards for student employment by publicly-operated elementary and secondary schools and for joint employment and definitions of volunteer services for the purposes of securing an overtime exemption. We urge the Department of Labor to immediately begin reviewing the FLSA regulations applicable to state and local governments.

In short, we believe that there is no need to amend or delay the full application of the FLSA to public employers. Some states and cities hope to accomplish their legislative agenda by grossly exaggerating the financial costs of the FLSA's overtime provisions. But contrary to the claims of the financial doomsayers, the cost of correcting FLSA inequities will not prove prohibitive. Many public employers are already in compliance. In time, these predictions will prove to be false, as the rest of employers comply with the law with no significant adverse effects.

In addition, we believe that state and local governments must act as model employers for the rest of the nation. In this vein, they must accept their responsibility to afford their public sector workers the same minimum labor standards, that private sector workers enjoy.

Fair overtime pay equity is pure and simple economic justice. The economic justice that our members have always stood for and fought hard to achieve.

THE ECONOMIC IMPACT OF
FLSA COVERAGE OF PUBLIC SECTOR WORKERS
SUMMARY

The Supreme Court's ruling in the Garcia case on February 19, 1985 granted minimum wage and overtime protections of the federal Fair Labor Standards Act (FLSA) to state and local government employees. Public employers immediately raised the specter of heavy financial burdens -- in the billions of dollars -- with states forced to raise taxes or cut services to meet the higher costs. The International City Managers Association recently put the cost increases at up to \$1.5 billion annually for counties and cities to bring police, firefighters, and professionals into compliance. Another estimate is \$3 billion based on a 1974 cost projection of extending FLSA coverage to state and local workers that was simply adjusted for inflation. These estimates vary widely and are highly speculative.

The Service Employees International Union represents over 1 million workers, of which 525,000 are in the non-federal public sector. In order to better understand how our membership is affected, the International looked at a large sample of SEIU contracts covering 68 percent of our public sector workers. These contracts define prevailing pay and overtime practices in numerous states, counties, cities, and school districts. They also cover a wide variety of jobs at the state and local levels--including clericals, blue collar workers, technicians, professionals, health workers, law enforcement, and fire protection. These contracts were matched to other data on contract employment, percent of public employees who work overtime and average weekly overtime hours to derive an estimate of the budgetary impact of FLSA coverage on states and localities with SEIU members. This study also examines the benefits of FLSA coverage for state and local workers generally.

Among the principal findings of our study are:

A: FINANCIAL IMPACTS

- o There is almost no financial impact of FLSA overtime coverage where public sector workers are represented by SEIU contracts -- \$2.8 million - \$3.3 million this year or .03% of their \$8.5 billion in wages. The reason is that our locals have negotiated strong overtime provisions that often exceed the minimum required by FLSA law.
- o The bulk of the new overtime benefits will go to SEIU-represented professionals and police.

- o The cost to any individual public employer is generally a fraction of a percent and at most 2.5% of SEIU wages.
- o The major costs stem from the need to pay premiums at a time and a half rate and a "one-time" cost if employers must "cash out" of compensation time banks (where employees save up time off for future use) any hours earned since February 19, 1985. Under FLSA law, time off is not allowed past the pay period. Once these bank hours are cashed out, the annual compliance cost should decline to about \$1.3 million.
- o Nationwide, state and local employees can expect to receive this year about \$210 million - \$298 million more in their paychecks as a direct result of Garcia. The impact is larger because many public employees work in states where collective bargaining does not exist or is severely limited. In addition, firefighters, a group not heavily represented in SEIU contracts, would receive more overtime pay. Yet, public employers can generally absorb the higher costs which represent at most .16% of their \$184 billion wage bills. The reasons are:

- (1) Most state laws set premium rates comparable to FLSA law. The key exceptions are Arkansas, Georgia and Mississippi for state employees (no overtime in cash) and Minnesota for local employees (overtime is after 48 hours). Also, some states in the South pay one-for-one compensation time.
- (2) The FLSA covered public schools and hospitals for 10 years (1966-1976). Many public employers complied and never reversed their pay practices after 1976.

B. FLSA AND CONTRACT PROVISIONS

The most frequent compliance problems to appear in SEIU contracts are:

- o Compensation time is a widespread pay practice -- explicitly called for in 40% of our public contracts for 62% of our public employees. About 40% of SEIU members elect to be paid in time off, rather than in cash. The general rule is to pay overtime hours in cash, except that individuals may take one and a half time off for each hour of overtime worked during the same pay period (a "time off" plan). Many workers indicate a willingness to use the "time off" option or to continue current leave practices, but without pay, and to collect the overtime in cash. The biggest sources of non-compliance are:

- (1) "banking" of compensation time (59% of our public employees and 96% of those offered compensation time)
- (2) payment of one-for-one compensatory time (about 2% of our public employees)

- o Some police contracts call for a 15 minute roll call period before a shift. These hours are compensable time. Most contracts pay for this roll call period through early relief by the next shift. However, several contracts provide a lump sum payment which is less than the FLSA required overtime rate or no pay.
- o Court appearances by police are also compensable time. Most contracts provide a minimum number of hours of payment at time and a half or straight time. Compensatory time payments are also frequent.
- o Some contracts paid no overtime in cash or at a rate less than time and a half. The most frequently affected employees were entry-level or other FLSA-nonexempt white collar employees. We estimate that about 5.7% out of more than 131,000 SEIU-represented professionals are entitled to new overtime benefits.

On balance, our locals have negotiated strong overtime provisions which exceed the minimum requirements of FLSA law. Of special interest:

- o About 25% of our public employees are professionals. Over 85% get premium pay at time and a half, whereas certain executive, administrative and professional employees may be exempted entirely from premium pay under FLSA law.
- o Our "typical" police contracts call for the payment of overtime at time and a half after 40 hours. About 35% of full-time police work 41 hours or more, so our contracts provide substantial overtime pay benefits. This provision exceeds the minimum FLSA hours standard (the 7(k) exemption) which requires premium rates only for work in excess of 42.75 hours in a 7-day work period (or 171 hours over a 28-day work period). Also, police departments employing less than 5 employees in law enforcement are entirely exempt from FLSA overtime standards.

Further information on the study's methodology and estimates is available from the International.

Senator NICKLES. Thank you very much.

I appreciate the comments of the panel.

Mr. Schaitberger, I worked with the firefighters, as you know, when we passed legislation on death benefits. Do you represent the Federal firefighters, too?

Mr. SCHAITBERGER. Yes, sir.

Senator NICKLES. Federal and State?

Mr. SCHAITBERGER. Yes.

Senator NICKLES. And Federal firefighters are under—

Mr. SCHAITBERGER. Are currently covered.

Senator NICKLES. They are covered. Do we have Federal firefighters involved in California, in the western fires right now?

Mr. SCHAITBERGER. Yes, a considerable number.

Senator NICKLES. We also have a lot of volunteers.

Mr. SCHAITBERGER. We had members of every level, and also volunteer firefighters not connected with any municipal government, as such, that were involved during the California fires.

Senator NICKLES. It's on a massive scale, isn't it?

Mr. SCHAITBERGER. Oh, absolutely. We had 22,000 members out at one point.

Senator NICKLES. Is it a lot less now?

Mr. SCHAITBERGER. Yes.

Senator NICKLES. Is comp time standard practice with most firefighters? Senator Matsunaga, myself and others were just hitting our States and talking to our firefighters; is that a normal practice?

Mr. SCHAITBERGER. I think that you would find a mix, and I would feel safe in saying that no more than an equal mix where you would find compensatory time used as opposed to overtime premium in the form of cash.

Senator NICKLES. So a lot of them do it one way and a lot do it the other way?

Mr. SCHAITBERGER. That's correct.

Senator NICKLES. I don't have any problem if somebody does it one way. My question is, do we want to mandate that they can't use comp time. The result I see from *Garcia* is that it's dictating that you don't have that option.

Comp time seems like it makes sense, from a budgetary point of view, for firefighters, detectives, or seasonal workers working for fish and wild life.

Mr. SCHAITBERGER. Well, currently, Mr. Chairman, there's the ability to utilize comp time and receive comp time within a 28-day period, so there is some flexibility, to that extent, currently.

Also, I would underline Ms. Connerton's statement, and that is that many of our overtime provisions currently provide overtime prior to the 53-hour limit, and there is no prohibition against those hours being paid in comp time and retaining that comp time in a bank. So there is some flexibility that currently exists under the provisions.

Senator NICKLES. Are most of the comp time arrangements 1 for 1, or if the individual is getting compensatory time for overtime, do they get a day and a half off for a day's overtime?

Mr. SCHAITBERGER. Well, unfortunately, that's one of the down sides in most comp time arrangements, and that is that they only

receive straight time as opposed to a premium time in the form of compensatory hours.

Senator NICKLES. Senator Matsunaga, do you have any questions?

Senator MATSUNAGA. Mr. Chairman, as a followup, you've heard earlier witnesses say that because of the high-pressure nature of their work, police and firefighters prefer comp time to cash payments to overtime.

Have you taken any poll among your members?

Mr. SCHAITBERGER. Well, Senator, in my remarks to the chairman just a moment ago, there are—we do have local affiliates, and there are firefighters who, at this time, would prefer comp time. However, I would think that there is an equal mix, and in our collective-bargaining States, predominately they prefer and have chosen, through that process, a premium in the form of time and a half in cash.

I think comp time has evolved, over a period of time, where no premium was received in our profession for a number of years, and so a lot of people have become used to that process. In those areas where we have bargaining, we find that they would choose, through that process, to receive cash.

Senator NICKLES. What percentage of the fire workers would you represent?

Mr. SCHAITBERGER. We represent about 68 percent of all the professional firefighters throughout the United States. We are proud to be one of the highest organized industries.

Senator MATSUNAGA. That is Federal, local, and State?

Mr. SCHAITBERGER. That's correct.

Senator NICKLES. I apologize to this panel and our next one because we're under a time constraint.

Thank you very much.

Our next and final panel consists of Paula MacIlwaine, from Dayton, OH; James Hankla, from Los Angeles, CA; and Abraham Aiona, from Maui, HI. All request the National Association of Counties. We also have Frank Forbes from Gainesville, FL, representing the National Public Employer Labor Relations Association and the International City Management Association; and Herbert R. HERN, president of the Industrial Employers and Distributors Association from California.

STATEMENT OF HON. PAULA MacILWAINE, DAYTON, OH; HON. JAMES HANKLA, LOS ANGELES, CA; HON. ABRAHAM AIONA, MAUI, HI, REPRESENTING THE NATIONAL ASSOCIATION OF COUNTIES; FRANK H. FORBES, NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION, GAINESVILLE, FL; AND HERBERT R. HERN, PRESIDENT, INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION, EMERYVILLE, CA

Ms. MACILWAINE. Thank you, Mr. Chairman. I am Paula MacIlwaine, president of Montgomery County, OH, Board of County Commissioners, and immediate past chair of the Employment and Labor Benefits Steering Committee of the National Association of Counties.

I am here today to strongly urge your support for legislation to alleviate the burdensome impact of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.

Because the Fair Labor Standards Act restricts our ability to use compensatory time and volunteers, we must now pay time and a half, the regular rate of pay, for all overtime; and we must pay volunteers at least the minimum wage if we desire to give them a stipend.

In my county, this is particularly important to us because we use a number of senior citizens as volunteers, whom we've always given a stipend to cover bus fare and lunch. Now the FLSA requires us to pay them the minimum wage.

It will cost States and localities in the billions of dollars to maintain current service levels under this ruling. We estimate, in my county alone, it will cost us \$900,000 for the period between April 15 and December 31.

Since we are in the middle of our budget year, I can assure you that we cannot afford this additional cost. A major concern is that we may have to cut vital services, such as police protection and fire prevention.

The flexible use of compensatory time and volunteers must be restored to States and localities so that we can assure adequate services in these vital areas.

While we believe that almost all counties pay their employees at least minimum wage, and I can assure you, we pay much higher than minimum wage, most did not pay time and a half for overtime, as required by the FLSA.

There are two significant reasons for this: One, we can't afford it; and, second, county employees, in many cases, prefer compensatory time off instead of additional pay. This is evidenced in our collective bargaining agreements which show that employees selected compensatory time, even when they had the option of choosing additional pay.

Mr. Chairman, the flexible use of compensatory time and volunteers is so vital to counties and other units of government. Many of you served at the local and State level before coming to the Senate, and I'm sure you understand the constraints on our local budget.

Many States, like my own State of Ohio, have laws which impose a ceiling on property taxes, limiting the amount of revenues that we can raise. Furthermore, all States require their counties to have a balanced budget at the end of the fiscal year. Contrary to what some believe, these constraints do not leave much room for flexibility in county budgets.

We need the flexibility to use compensatory time and volunteers as alternatives to meeting the public's demand for increased services when we are faced with budget shortfalls. Counties, their employees and the taxpayer all benefit from these employment practices.

Before the *Garcia* decision, we were able to increase public services on a temporary basis as needed without increasing our costs; and county employees were able to earn extra time off and gain valuable work experience from serving as volunteers.

As far as we know, these alternatives posed no problem for anyone. Clearly, Mr. Chairman, the changes imposed by the *Garcia*

decision will not correct any problems, but instead will create an enormous hardship on our State and local operations.

Because of the nature of many services, States and localities have long exercised flexibility in scheduling certain employees' work hours to ensure sufficient and adequate services. Our law enforcement officers and firefighters traditionally have been allowed to work overtime in order to respond to emergencies and to conduct investigations as situations require.

And I would take issue with one of the previous speakers who said that permitting employees to work overtime is a management objective, that management can decide these things. It is not as simple as that. When a fire breaks out or when police are needed at an accident, it would be irresponsible to assume that public officials have the option of deciding whether or not to respond to these emergencies when overtime pay is required.

With the mandate to pay time and a half for all overtime, State and local governments cannot afford to be flexible in permitting their employees to work overtime. In many cases, we will be forced to cut services.

Recently, an article in the Washington Post talked about the D.C.'s Police Department ordering one of its police officers to cut short an investigation of a serious crime in order to avoid paying him time and a half for overtime.

Public works is another area where counties are in need of flexible scheduling. Because employees working on road and highway construction and repair cannot work in inclement weather, they have traditionally worked longer hours in the spring, summer, and a portion of the fall. During this period, they were permitted to accumulate compensatory time that they could use during the winter months when the weather prohibited a regular work schedule.

Mandatory training is another area that we believe will cause problems for counties. In my county, for instance, we hire 10 to 15 new sheriff recruits each year. They are required to take 8 hours of training per week. This will cost us an additional \$120,000 to \$180,000 to train these recruits because their training will require us now to pay them time and a half.

Mr. Chairman, counties use volunteers for a variety of services: police, fire, parks and recreation, health care, disaster preparedness, libraries, and shelter programs. These are just a few of a long list of volunteer services identified in our recent survey of different services provided by our member counties.

Many off-duty county employees serve as volunteers, sometimes in the same capacity as their regular job, and sometimes in a different capacity. The FLSA regulations prohibit public employees from volunteering to serve in the same or similar capacity.

For example, a county bus driver, with the transportation department, who wants to volunteer as a driver in our county run Meals-on-Wheels Program for the elderly, is prohibited. A clerical worker in any county agency cannot volunteer to serve as a clerical worker with a different agency.

These restrictions pose a problem particularly in small counties where some agencies are run exclusively by volunteers.

Some county volunteers receive a small stipend. As I mentioned earlier, we use a lot of senior citizens in our government, and now we have to pay them minimum wage.

In my county, fire prevention is provided exclusively in some of our smaller cities by volunteers. These firefighters earn points each time they answer a call. They receive a stipend two times a year based on the number of points they have accumulated. The FLSA regulations stipulate that a volunteer firefighter may not be reimbursed more than \$2.50 per call. I don't know of any situation where a volunteer firefighter receives a stipend as low as \$2.50 a call.

Because of the nature of county governments, most will not be able to comply quickly with the Fair Labor Standards Act. It is both unreasonable and unfair to expect counties to comply with these requirements before they fully understand them. State and local officials must be provided training and technical assistance before they are required to comply with these requirements and before they are penalized for noncompliance.

Senator NICKLES. I wonder if I might interrupt—we have several other speakers. We will enter your entire statement in the record, and I will come back to you on the questioning, as well.

Ms. MACILWAINE. OK. If I could just summarize with three points, and I have eliminated quite a bit of my testimony by speaking to you, but there are three things that I would like to emphasize: We urge you to enact legislation that would exempt State and local governments from the maximum hours provision of the Fair Labor Standards Act; exempt State and local governments from the restrictive provisions in the FLSA regulations on volunteers; and establish a prospective effective date for application and enforcement of the FLSA.

Thank you, Mr. Chairman.

[The prepared statement of Ms. MacIlwaine follows:]

STATEMENT OF THE HONORABLE PAULA MACILWAINE ON STATE AND LOCAL GOVERNMENTS AND THE FAIR LABOR STANDARDS ACT, ON BEHALF OF THE NATIONAL ASSOCIATION OF COUNTIES (NACo)*, BEFORE THE UNITED STATES SENATE SUBCOMMITTEE ON LABOR OF THE SENATE LABOR AND HUMAN RESOURCES COMMITTEE

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE I AM PAULA MACILWAINE, PRESIDENT OF THE MONTGOMERY COUNTY, OHIO BOARD OF COMMISSIONERS AND IMMEDIATE PAST CHAIR OF THE EMPLOYMENT AND LABOR BENEFITS STEERING COMMITTEE OF THE NATIONAL ASSOCIATION OF COUNTIES.* I AM HERE TODAY TO STRONGLY URGE YOUR SUPPORT FOR LEGISLATION TO ALLEVIATE THE BURDENSOME IMPACT OF THE SUPREME COURT'S DECISION IN GARCIA V. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY. THIS DECISION, WHICH REQUIRES IMMEDIATE COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT, HAS CREATED A FINANCIAL AND ADMINISTRATIVE NIGHTMARE FOR COUNTIES ACROSS THE NATION. IT BROUGHT AN ABRUPT END TO LONG STANDING EMPLOYMENT PRACTICES AT THE STATE AND LOCAL LEVEL. AT THIS VERY MOMENT, MR CHAIRMAN, COUNTIES ARE LIABLE FOR ESTIMATED MILLIONS IN BACK PAY FOR WAGES DUE TO THE RETROACTIVE APPLICATION OF THIS DECISION. BECAUSE THE FLSA RESTRICTS OUR ABILITY TO USE COMPENSATORY TIME AND VOLUNTEERS, WE MUST NOW PAY TIME-AND-A-HALF THE REGULAR RATE OF PAY FOR ALL OVERTIME. WE MUST ALSO PAY VOLUNTEERS AT LEAST THE MINIMUM WAGE IF WE DESIRE TO GIVE THEM A STIPEND.

* THE NATIONAL ASSOCIATION OF COUNTIES IS THE ONLY NATIONAL ORGANIZATIONAL REPRESENTING COUNTY GOVERNMENT IN THE UNITED STATES. THROUGH ITS MEMBERSHIP, URBAN, SUBURBAN AND RURAL COUNTIES JOIN TOGETHER TO BUILD EFFECTIVE, RESPONSIVE, COUNTY GOVERNMENT. THE GOALS OF THE ORGANIZATION ARE TO: IMPROVE COUNTY GOVERNMENT; SERVE AS THE NATIONAL SPOKESMAN FOR COUNTY GOVERNMENT; ACT AS A LIAISON BETWEEN THE NATION'S COUNTIES AND OTHER LEVELS OF GOVERNMENT; ACHIEVE PUBLIC UNDERSTANDING OF THE ROLE OF COUNTIES IN THE FEDERAL SYSTEM.

IT WILL COST STATES AND LOCALITIES IN THE BILLIONS OF DOLLARS TO MAINTAIN CURRENT SERVICE LEVELS UNDER THE GARCIA RULING. IN MY COUNTY, WE ESTIMATE THE ADDITIONAL COSTS TO BE \$900,000 FOR THE PERIOD BETWEEN APRIL 15 AND DECEMBER 31. I CAN ASSURE YOU THAT WE CAN NOT AFFORD THESE ADDITIONAL COSTS AND WILL BE FORCED TO CUT SERVICES. OUR MAJOR CONCERN IS THAT VITAL SERVICES SUCH AS POLICE PROTECTION AND FIRE PREVENTION MAY HAVE TO BE CUT AT EXPENSE OF ASSURING THE PUBLIC SAFETY. THE FLEXIBLE USE OF COMPENSATORY TIME AND VOLUNTEERS MUST BE RESTORED TO STATES AND LOCALITIES TO ASSURE ADEQUATE SERVICES IN THESE VITAL AREAS.

ON FEBRUARY 19 THE SUPREME COURT ANNOUNCED THE GARCIA RULING WHICH EXTENDED THE APPLICATION OF THE FAIR LABOR STANDARDS ACT (FEDERAL MINIMUM WAGE AND OVERTIME PAY STANDARDS) TO VIRTUALLY ALL STATE AND LOCAL EMPLOYEES. WHILE WE BELIEVE ALMOST ALL COUNTIES PAID THEIR EMPLOYEES AT LEAST THE MINIMUM WAGE, MOST DID NOT PAY TIME AND A HALF FOR OVERTIME AS REQUIRED BY THE FAIR LABOR STANDARDS ACT. THERE ARE TWO SIGNIFICANT REASONS FOR THIS: (1) AS STATED EARLIER, MOST COUNTIES CAN NOT AFFORD TIME-AND-A-HALF AND (2) COUNTY EMPLOYEES IN MANY CASES PREFER COMPENSATORY TIME OFF INSTEAD OF ADDITIONAL PAY. THIS IS EVIDENCED IN MANY COLLECTIVE BARGAINING AGREEMENTS WHICH SHOW THAT EMPLOYEES SELECTED COMPENSATORY TIME EVEN WHEN THEY HAD THE OPTION OF CHOOSING ADDITIONAL PAY.

MR. CHAIRMAN, THE FLEXIBLE USE OF COMPENSATORY TIME AND VOLUNTEERS IS VITAL TO COUNTIES AND OTHER UNITS OF GOVERNMENT. MANY OF YOU SERVED AT THE STATE AND LOCAL LEVEL BEFORE COMING TO THE SENATE AND I AM SURE YOU UNDERSTAND THE CONSTRAINTS ON LOCAL BUDGETS. MANY STATES, LIKE MY OWN STATE OF OHIO, HAVE PASSED LAWS

IMPOSING A CEILING ON PROPERTY TAXES WHICH LIMIT THE AMOUNT OF REVENUES LOCAL GOVERNMENTS MAY RAISE. FURTHERMORE, ALL STATES REQUIRE THEIR COUNTIES TO HAVE A BALANCED BUDGET AT THE END OF THE FISCAL YEAR. CONTRARY TO WHAT SOME BELIEVE, THESE CONSTRAINTS DO NOT LEAVE MUCH ROOM FOR FLEXIBILITY IN COUNTY BUDGETS.

PRIOR TO THE GARCIA RULING, COUNTY EMPLOYEES ENGAGED IN "TRADITIONAL GOVERNMENTAL FUNCTIONS" WERE EXEMPT FROM THE FAIR LABOR STANDARDS ACT. THIS EXEMPTION PROVIDED STATES AND LOCALITIES THE FLEXIBILITY THEY NEEDED TO USE COMPENSATORY TIME AND VOLUNTEERS AS ALTERNATIVES TO MEETING THE PUBLIC'S DEMAND FOR INCREASED SERVICES WHEN FACED WITH BUDGET SHORTFALLS. COUNTIES, THEIR EMPLOYEES AND THE TAXPAYERS ALL BENEFITED FROM THESE EMPLOYMENT PRACTICES. COUNTIES WERE ABLE TO PROVIDE BADLY NEEDED PUBLIC SERVICES WITHOUT INCREASING THE COST TO TAXPAYERS AND COUNTY EMPLOYEES WERE ABLE TO EARN EXTRA TIME OFF, OR GAIN VALUABLE WORK EXPERIENCE FROM SERVING AS VOLUNTEERS. AS FAR AS WE KNOW, THE ALTERNATIVE USE OF COMPENSATORY TIME AND VOLUNTEERS POSED NO PROBLEMS FOR ANYONE. CLEARLY MR. CHAIRMAN, THE CHANGES IMPOSED BY THE GARCIA DECISION WILL NOT CORRECT ANY PROBLEMS BUT INSTEAD CREATE AN ENORMOUS HARDSHIP ON MANY STATE AND LOCAL OPERATIONS. LET ME SHARE WITH YOU SOME OF THE PROBLEMS WE FACE AS A RESULT OF THE DECISION.

BECAUSE OF THE NATURE OF MANY SERVICES, STATES AND LOCALITIES HAVE LONG EXERCISED FLEXIBILITY IN SCHEDULING MANY EMPLOYEES' WORK HOURS IN ORDER TO INSURE EFFICIENT AND ADEQUATE SERVICES. FOR EXAMPLE, PUBLIC SAFETY WORKERS (LAW ENFORCEMENT OFFICERS AND FIRE-FIGHTERS) HAVE BEEN TRADITIONALLY ALLOWED TO WORK OVERTIME IN ORDER TO RESPOND TO EMERGENCIES AND TO CONDUCT INVESTIGATIONS AS SITUATIONS MAY DEMAND. DEPENDING ON THE NATURE OF THE EMERGENCY OR

SITUATION, THEY HAVE BEEN PERMITTED TO WORK LONGER HOURS WHEN THEIR JOBS DEMANDED IT AND TAKE EXTRA TIME OFF WHEN THEIR WORK SCHEDULES PERMITTED. WITH THE MANDATE TO PAY TIME-AND-A-HALF FOR ALL OVERTIME, STATES AND LOCALITIES CAN NOT AFFORD TO BE FLEXIBLE IN PERMITTING OVERTIME WORK. IN MANY CASES THEY WILL BE FORCED TO CUT SERVICES. JUST RECENTLY, MR CHAIRMAN, AN ARTICLE APPEARED IN THE WASHINGTON POST ABOUT THE DISTRICT OF COLUMBIA'S POLICE DEPARTMENT ORDERING ONE OF ITS POLICE OFFICERS TO CUT SHORT AN INVESTIGATION OF A SERIOUS CRIME IN ORDER TO AVOID HAVING TO PAY TIME-AND-A-HALF FOR OVERTIME.

PUBLIC WORKS IS ANOTHER AREA WHERE FLEXIBLE SCHEDULING HAS BEEN USED. BECAUSE EMPLOYEES WORKING ON ROAD AND HIGHWAY CONSTRUCTION AND REPAIR CAN NOT WORK IN INCLEMENT WEATHER, THEY HAVE TRADITIONALLY WORKED LONGER HOURS IN THE SPRING, SUMMER AND A PORTION OF THE FALL. DURING THIS PERIOD THEY WERE PERMITTED TO ACCUMULATE COMPENSATORY TIME WHICH THEY WOULD USE DURING THE WINTER MONTHS WHEN THE WEATHER PROHIBITS A REGULAR WORK SCHEDULE. SIMILARLY, WINTER SNOW AND ICE REMOVAL CREATE OCCASIONAL BUT SUBSTANTIAL DEMANDS FOR LONG HOURS. FLEXIBILITY IN SCHEDULING HAS ENABLED US TO CREATE FULL TIME JOBS WHICH WOULD OTHERWISE BE SEASONAL AND LESS ATTRACTIVE TO WORKERS WITH GOOD SKILLS AND WORK HABITS. WITH THE GARCIA RULING, STATES AND LOCALITIES WILL BE HARD PRESSED TO MAINTAIN FLEXIBLE SCHEDULING IN THIS AREA.

MANDATORY TRAINING IS ANOTHER AREA THAT WILL CAUSE PROBLEMS FOR COUNTIES. UNDER THE FAIR LABOR STANDARDS ACT, STATES AND LOCALITIES ARE REQUIRED TO PAY THEIR EMPLOYEES FOR THE TIME SPENT IN MANDATORY TRAINING. IF THE ADDITIONAL TIME SPENT IN TRAINING CALCULATES INTO OVERTIME, EMPLOYEES MUST BE PAID TIME-AND-A-HALF. MANY COUNTIES HAVE MANDATORY TRAINING FOR THEIR LAW ENFORCEMENT

OFFICERS. THE ADDITIONAL COSTS IN THIS AREA COULD BE VERY SIGNIFICANT.

IN MY COUNTY WE HIRE TEN TO FIFTEEN NEW SHERIFF RECRUITS EACH YEAR. THEY ARE REQUIRED TO TAKE EIGHT HOURS OF TRAINING PER WEEK. IT COULD COST US BETWEEN \$120,000 AND \$180,000 IN ADDITIONAL COST TO TRAIN THESE RECRUITS BECAUSE THEIR TRAINING WILL REQUIRE US TO PAY THEM TIME-AND-A-HALF.

MR. CHAIRMAN, COUNTIES USE VOLUNTEERS FOR A VARIETY OF SERVICES: POLICE, FIRE, PARKS AND RECREATION, HEALTH CARE, DISASTER PREPAREDNESS, LIBRARIES AND SHELTER PROGRAMS. THESE ARE JUST A FEW OF A LONG LIST OF VOLUNTEER SERVICES IDENTIFIED IN A RECENT NACo SURVEY OF DIFFERENT TYPES OF SERVICES PROVIDED BY COUNTIES. MANY OFF DUTY COUNTY EMPLOYEES SERVE AS VOLUNTEERS, SOMETIMES IN THE SAME CAPACITY AS THEIR REGULAR JOB AND SOMETIMES IN A DIFFERENT CAPACITY. THE FLSA REGULATIONS PROHIBIT PUBLIC EMPLOYEE FROM VOLUNTEERING TO SERVE IN THE SAME OR SIMILAR CAPACITY AS THEIR REGULAR JOB WITH THE SAME EMPLOYER. FOR EXAMPLE, A COUNTY BUS DRIVER FOR THE TRANSPORTATION DEPARTMENT WHO DESIRES TO VOLUNTEER AS A DRIVER IN A COUNTY-RUN MEALS-ON-WHEELS PROGRAM FOR THE ELDERLY IS PROHIBITED. A CLERICAL WORKER IN ANY COUNTY AGENCY MAY NOT VOLUNTEER TO SERVE AS A CLERICAL WORKER WITH A DIFFERENT AGENCY. THESE RESTRICTIONS POSE A PROBLEM, PARTICULARLY IN SMALL COUNTIES WHERE SOME AGENCIES ARE RUN EXCLUSIVELY BY VOLUNTEERS.

SOME COUNTY VOLUNTEERS RECEIVE A SMALL STIPEND. IF THE STIPEND AMOUNTS TO MORE THAN REIMBURSEMENT OF INCIDENTAL EXPENSES AN EMPLOYER - EMPLOYEE RELATIONSHIP IS CREATED ACCORDING TO THE FLSA. IN SUCH CASES, THE EMPLOYEE IS ENTITLED TO AT LEAST THE MINIMUM

WAGE. THIS CAUSES A SERIOUS PROBLEM NOT MERELY BECAUSE OF ITS FINANCIAL IMPLICATIONS BUT BECAUSE IT REQUIRES US TO SET UP AND MAINTAIN A PUBLIC RECORDKEEPING SYSTEM. THE REQUIREMENT FOR SUCH RECORDKEEPING BY VOLUNTEERS MAY BE A SUBSTANTIAL DISINCENTIVE TO VOLUNTEER RECRUITMENT.

IN MY COUNTY, FIRE PREVENTION IS PROVIDED EXCLUSIVELY BY VOLUNTEERS THROUGH THE SMALL TOWNS. THE FIREFIGHTERS EARN POINTS EACH TIME THEY ANSWER A CALL. THEY RECEIVE A STIPEND TWO TIMES A YEAR BASED ON THE NUMBER OF POINTS THEY HAVE ACCUMULATED. THE FLSA REGULATIONS STIPULATE THAT A VOLUNTEER FIREFIGHTER MAY NOT BE REIMBURSED NO MORE THAN \$2.50 PER CALL. I DON'T KNOW OF ANY SITUATION WHERE A VOLUNTEER FIREFIGHTER RECEIVES A STIPEND AS LITTLE AS \$2.50 PER CALL. IF THESE RESTRICTIONS ARE NOT OVERTURNED, THEY MAY VERY WELL DEFEAT THE PURPOSE OF HAVING VOLUNTEERS IN THE PUBLIC SECTOR.

BECAUSE OF THE NATURE OF COUNTY GOVERNMENTS, MOST WILL NOT BE ABLE TO COMPLY QUICKLY WITH THE FAIR LABOR STANDARDS ACT. ONE OF THE FIRST BIG OBSTACLES WE MUST OVERCOME IS SORTING OUT ALL OF THE DIFFERENT AREAS AFFECTED BY THE COURT'S DECISION. SINCE STATE AND LOCAL GOVERNMENT COVERAGE IS A NEW REQUIREMENT, MOST OF US DO NOT HAVE A COMPREHENSIVE UNDERSTANDING OF ALL THAT MUST BE DONE IN ORDER TO COME INTO COMPLIANCE WITH THE FAIR LABOR STANDARDS ACT. IT IS BOTH UNREASONABLE AND UNFAIR TO EXPECT COUNTIES TO COMPLY WITH THESE REQUIREMENTS BEFORE THEY FULLY UNDERSTAND THEM. STATE AND LOCAL OFFICIALS MUST BE PROVIDED TRAINING AND TECHNICAL ASSISTANCE BEFORE THEY ARE REQUIRED TO COMPLY WITH THESE REQUIREMENTS AND BEFORE THEY ARE PENALIZED FOR NON-COMPLIANCE.

THE LABOR DEPARTMENT ISSUED ENFORCEMENT POLICY ON THE GARCIA DECISION ON JUNE 14. THE EFFECTIVE DATE OF THE POLICY WAS MADE RETROACTIVE TO APRIL 15. THIS MEANS THAT STATES AND LOCALITIES ARE LIABLE FOR NONCOMPLIANCE WITH THE TIME-AND-A-HALF OVERTIME PROVISIONS OF THE FAIR LABOR STANDARDS ACT EFFECTIVE APRIL 15. ALTHOUGH THE LABOR DEPARTMENT HAS DECIDED TO DELAY ENFORCEMENT UNTIL OCTOBER 15, THERE IS NOTHING TO PRECLUDE PUBLIC EMPLOYEES FROM PURSUING PRIVATE ACTIONS IN THE COURTS. THERE ARE ALREADY SEVERAL CASES PENDING AGAINST JURISDICTIONS IN CALIFORNIA AND NORTH CAROLINA.

I HAVE ONLY DISCUSSED A FEW OF THE PROBLEMS THAT STATES AND LOCALITIES WILL CONTINUE TO EXPERIENCE UNTIL THERE IS LEGISLATIVE RELIEF. WE ASK YOU AND THE MEMBERS OF THIS COMMITTEE TO SUPPORT US IN OUR EFFORTS TO RESTORE STATE AND LOCAL CONTROL OVER OUR EMPLOYMENT PRACTICES. WE STRONGLY URGE YOUR SUPPORT FOR LEGISLATION THAT WOULD:

- o EXEMPT STATE AND LOCAL GOVERNMENTS FROM THE MAXIMUM HOURS PROVISIONS OF THE FAIR LABOR STANDARDS ACT.
- o EXEMPT STATE AND LOCAL GOVERNMENTS FROM THE RESTRICTIVE PROVISIONS IN THE FLSA REGULATIONS ON VOLUNTEERS.
- o ESTABLISH A PROSPECTIVE EFFECTIVE DATE FOR APPLICATION AND ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT.

MR CHAIRMAN THAT CONCLUDES MY TESTIMONY. I WOULD LIKE TO COMMEND YOU FOR HOLDING THESE HEARINGS AND FOCUSING NATIONAL ATTENTION ON PERHAPS THE MOST BURDENSOME PROBLEM FACING COUNTY GOVERNMENTS. THANK YOU FOR THE OPPORTUNITY TO TESTIFY AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS THAT YOU OR ANY OF THE OTHER MEMBERS MAY HAVE.

Senator NICKLES. Thank you very much.
Our next guest is Mr. Aiona from Hawaii.

Mr. AIONA. Thank you, Mr. Chairman.
Aloha, Senator Matsunaga.

Senator MATSUNAGA. Aloha.

Mr. Chairman, I would like to welcome my good friend Abe Aiona from Maui. I think he has traveled the longest distance to be here.

Welcome to Washington and to testify before this subcommittee.

Mr. AIONA. Thank you, sir.

Senator NICKLES. We appreciate the fact that you would travel that distance, and we look forward to your statement.

Mr. AIONA. I just recently returned home from NACo's annual conference in Orlando, so I turned around and came here without much time to get resettled.

For the record, Mr. Chairman, my name is Abraham Aiona. I am a member of the county council of Maui County which is a political subdivision of the State of Hawaii.

I am offering testimony today on behalf of the National Association of Counties and the Hawaii State Association of Counties, which consists of four counties. We appreciate the chance to offer testimony on the application of the Fair Labor Standards Act to State and local governments.

During my years of public service, I have occupied various positions and offices directly related to local government functions which are greatly affected by the Fair Labor Standards Act, "FLSA" for short.

I began my government career in 1947, with 22½ years on the police force of the city and county of Honolulu. During those years, my assignments included supervisory and managerial positions, overseeing management relations.

Subsequently, I served 7 years as police chief of the county of Maui, a post I held until my retirement.

I was first elected to the Maui County Council in 1977 and have had the privilege of being reelected at every election since. I now serve as Hawaii's elected representative on the board of directors of the National Association of Counties.

My testimony centers around the FLSA and the Supreme Court's recent decision in the case of *Garcia v. San Antonio Metropolitan Transit Authority*.

As you know, almost 10 years ago, the Supreme Court decided the case of *National League of Cities v. Usery*, ruling that the Constitution prevented FLSA from applying to the States and their local governments. In its *Garcia* decision, the Supreme Court reversed itself and held that FLSA could be applied to the State and local governments.

The National Association of Counties and the Hawaii State Association of Counties urge this Congress to reverse the Supreme Court's *Garcia* decision by enacting legislation exempting State and local governments from the FLSA.

I will skip some of my written testimony because some of my points have already been covered by some of the other speakers.

I would like to cover the fourth stated in my written testimony for why State and local governments should be exempt from the

FLSA. Enacting legislation to exempt State and local governments from the FLSA will not work a drastic change in State and local labor practices, but will merely return Federal law to what it was before *Garcia* was decided. Nothing will be changed and nothing will be lost.

If, on the other hand, such legislation is not passed, then there will be substantial costs incurred by the Federal, State, and local governments in gearing up to implement the FLSA. There will be added bureaucracy, diminished flexibility, and increased costs or reduced services at every level of government.

Mr. Chairman, if I may, I'd like to cite an example about what happened in my small county, which consists of four islands. Although we are small in population, we cover 1,300 square miles if you put all the land mass together.

When I was chief in 1971, we had traffic fatalities of 23 during 1971. When we made an analysis of what was happening, we found out that alcohol was related in 80 percent of those cases.

What I did was have my staff put together a plan which we embarked on for identifying and removing drunk drivers from the streets. We didn't use any overtime cash money, simply because we didn't have it. We asked the union if they would sit with us and work it out so that we could give our police officers comp time off, one and 1½ hours for each hour worked.

The night shift that finished at 11 p.m. then worked from 11 to 4 or 11 to 5, when most of the discos and night clubs closed down.

What happened was that we reduced the traffic deaths from 23 to 10, and it showed the correlation between alcohol and traffic deaths on the highways. It also showed that by using overtime and comp time we were able to do something to save lives, and I don't think you can measure saving lives in dollars and cents.

It further shows us that sometimes you may have to be innovative, you may have to be flexible, and you may have to use some of those ideas which you can't pay cash for, simply because your budget does not allow for it.

I don't want to take too much time. I just want to say that—I think Paula covered it—and for these reasons, we respectfully request that Congress pass legislation exempting State and local governments from the FLSA, and prohibiting retroactive application of the act.

If such legislation is rejected, then we would request the Congress to provide for a grace period, to allow all levels of government the time needed to bring their regulations and operations into full compliance.

I just want to add one more comment. Hawaii was the first State to have collective bargaining laws passed. Hawaii has 13 bargaining units within the sphere of employment in government workers, and so you have a lot of negotiated contracts that have been passed over the years.

I do recall—I am directly affected, because my son who came back from Vietnam, didn't want to become a policeman because of the long hours that we worked. He is a fireman today because he wanted a work schedule that would allow him time to go to school. So I guess he's figuring that maybe it would be better now if he

had been a policeman since the FLSA is likely to force the county to shorten the work schedule for policemen.

I do want to say thank you for allowing me to testify. I did have a rough time getting over here, but United Airlines was nice to upgrade my travel to first class, so that kind of compensated for the travel. Thank you very much.

[The prepared statement of Mr. Aiona follows:]

TESTIMONY BEFORE THE SENATE LABOR SUBCOMMITTEE
BY COUNCILMAN ABRAHAM AIONA
COUNTY OF MAUI, STATE OF HAWAII
REPRESENTING THE NATIONAL ASSOCIATION OF COUNTIES
AND THE HAWAII STATE ASSOCIATION OF COUNTIES
JULY 25, 1985

For the record, Mr. Chairman, my name is Abraham Aiona. I am a member of the County Council of Maui County, which is a political subdivision of the State of Hawaii.

I am offering testimony today on behalf of the National Association of Counties, and the Hawaii State Association of Counties. These organizations are composed of elected local government officials. We appreciate the chance to offer testimony on the application of the Fair Labor Standards Act to state and local governments.

During my years of public service, I have occupied various positions and offices directly related to the sort of local government functions which are greatly affected by the Fair Labor Standards Act - "FLSA" for short.

I began my government career in 1947 with 22½ years on the police force of the City and County of Honolulu. During those years, my assignments included supervisory and managerial positions overseeing labor management relations.

Subsequently, I served seven years as Police Chief of the County of Maui, a post I held until my retirement.

I was first elected to the Maui County Council in 1977, and have had the privilege of being reelected at every election since. I now

serve as Hawaii's elected representative on the Board of Directors of the National Association of Counties.

My testimony centers around the FLSA, and the Supreme Court's recent decision in the case of Garcia v. San Antonio Metropolitan Transit Authority.

As you know, almost ten years ago the Supreme Court decided the case of National League of Cities v. Usery ruling that the Constitution prevented FLSA from applying to the states and their local governments. In its Garcia decision, the Supreme Court reversed itself and held that FLSA could be applied to state and local governments.

The National Association of Counties and the Hawaii State Association of Counties urge this Congress to reverse the Supreme Court's Garcia decision by enacting legislation exempting state and local governments from the FLSA.

Our reasons for making this request are as follows:

First, if corrective legislation is not passed, costs and revenue needs for all levels of government will increase.

Second, application of the FLSA to the states will stifle innovation and creativity in public management, and will run against the trend toward streamlining and eliminating government regulations.

Third, enacting such legislation will not work a drastic change in state and local labor practices, but will merely return federal law to what it was before Garcia was decided.

Fourth, application of the FLSA to the states destroys the last vestiges of state sovereignty.

With your indulgence, Mr. Chairman, I will briefly explain each of these points.

Firstly, we request Congress to act to prevent a waste of government resources. At the Federal level, the Department of Labor will have to oversee application of the FLSA to each state and each local government. The Department will have to increase its administrative outlays, adding further to the huge federal deficit already projected. In addition, each state and each local government will have to add to their bureaucracies to assure compliance with the complex work and reporting standards. All of these costs will be borne by the taxpayers of our nation, all of whom might be forgiven for not understanding why one government must regulate another. Bear in mind, we are not dealing with a social issues of overriding importance such as racial discrimination; we are considering relatively minor work issues which will sap the federal government's resources and leave it less able to deal with more important labor problems.

Secondly, we ask Congressional action in order to give the state and local governments the flexibility to innovate in the area of public management. Improved public management practices can be more efficiently tested in the state and local governments, rather than at the national level. A prime example is the "flextime" concept, by which employees can arrange their work hours to suit their individual needs. The "flextime" concept is extremely difficult to implement under the FLSA because even voluntary unauthorized overtime must be compensated. In practice, FLSA requires the supervisor to be present whenever there is even one employee working, in order to assure that

each employee's workday begins no sooner, and ends no later, than is proper. It is just this sort of reduced flexibility that has provided the impetus for the federal deregulation effort of the last few years.

Thirdly, we urge Congress to adhere to the principle of state sovereignty. It is conceded that the Supreme Court, in deciding the Garcia case, ruled that as a legal matter the Constitution did not prevent the federal government from intruding into the personnel practices and procedures of the states. In its decision, which reversed its previous position on the issue, the Supreme Court dwelled on the unworkability of any standard to define state sovereignty. In other words, the Court did not decide whether state sovereignty should be allowed; instead, the issue was whether the Court could fashion a usable standard to protect states rights. When the Court could not find a usable standard, it left state sovereignty to Congressional discretion. We are here to ask that you use that discretion wisely.

Fourthly, enacting legislation to exempt state and local governments from the FLSA will not work a drastic change in state and local labor practices, but will merely return federal law to what it was before Garcia was decided. Nothing will be changed, and nothing will be lost. If, on the other hand, such legislation is not passed, then there will be substantial costs incurred by the federal, state, and local governments in gearing up to implement the FLSA. There will be added bureaucracy, diminished flexibility, and increased costs or reduced services at every level of government.

For these reasons, we respectfully request that Congress pass legislation exempting state and local governments from the FLSA, and prohibiting retroactive application of the Act.

If such legislation is rejected, then we would request that Congress provide for a grace period to allow all levels of government the time needed to bring their regulations and operations into full compliance.

Thank you for this opportunity to offer testimony. We trust that you will come to the right decision.

Senator NICKLES. Thank you very much.

Senator Matsunaga, do you have any comments?

Senator MATSUNAGA. Because of the time element, I will ask my questions when I meet him privately later.

Thank you, sir.

Senator NICKLES. Thank you both for—

Senator MATSUNAGA. Mr. Chairman, I am already 35 minutes late for another appointment.

Senator NICKLES. I understand and appreciate your attendance. I look forward to working with you on this issue. Thank you very much.

Next we have Mr. Hankla.

Mr. HANKLA. Thank you very much, Mr. Chairman, and members of the subcommittee for this opportunity to testify.

I am James Hankla, chief administrative officer for the county of Los Angeles. I will endeavor to be brief.

I am here to express the concerns of the Los Angeles County Board of Supervisors regarding the recent *Garcia* decision and its required implementation of the Fair Labor Standards Act.

So that you will have a better understanding of our operations, let me give you a brief overview of the county. First of all, Los Angeles County has almost 8 million residents and is larger in population than 42 of the 50 States. It is spread over 4,083 square miles and accounts for roughly one-third of the State's work force.

The county has within its boundaries 84 incorporated cities, covering about 1,000 square miles. In the remaining unincorporated area, the county board of supervisors serves as the city council to over 1 million residents, making it the seventh largest city in the United States. County departments provide municipal-type services, such as police, fire protection, road, and library services.

Beyond these municipal services, Los Angeles County provides a long range of services to all of its residents in both the unincorporated and incorporated areas. These services can be divided into three areas: human resources and services, including health, mental health, welfare and social services, the criminal and civil justice support system, and disaster planning and response; government services, such as administering the property tax system, voter registration and elections, recording and storing vital statistics and

property documents; and countywide cultural and recreational services.

These services are provided by the county's 72,000 employees, with the assistance of thousands of volunteers.

The *Garcia* decision will cost the county of Los Angeles more than \$50 million per year. Although Los Angeles has an adopted budget for 1985-86 of \$6.7 billion, we will be unable to absorb this cost increase without major service cuts.

The why is proposition 13, which started a nationwide tax limitation movement in 1978, and left us with no independent revenue-raising authority.

Since 1979-80, our local costs for welfare, jails, and courts have gone up by 115, 106, and 76 percent respectively, but our local revenue sources have gone up only 58 percent, and our surplus has been totally exhausted.

This latter item is most critical because California counties must adopt balanced budgets and must end the fiscal year in the black.

The 1985-86 Los Angeles County budget contains no funding for Fair Labor Standards Act cost increases, or for the second time in 3 years, no funding for employee cost-of-living adjustments, simply because there is no money available. Any unavoidable FLSA-related cost increase will have to be absorbed by our work force through service reductions, and I can guarantee to the representative of organized labor here that that will mean layoffs.

I want to assure you that Los Angeles County will give priority to the most critical public protection services. We will not shirk our essential duties concerning law enforcement, public health, child abuse prevention, urban and wild-land brush fires, and other natural disasters. The fiscal shoe will have to pinch elsewhere to the detriment, certainly, of those public employees whom the FLSA ostensibly protects, and to the detriment of the public who will receive a lower level of service because of our inability to raise the revenue.

Let me give you a few examples of our current employee protections. I would like to quickly review those protections which are currently in place for all county employees throughout California.

Local government in California has long been known for its fair and equitable treatment of employees. Los Angeles County, for example, provides a comprehensive civil service procedure for addressing the grievances of county employees, as well as ensuring their rights to due process in all disputes.

The county also participates in collective bargaining, and I am currently negotiating with 58 bargaining units. This allows employees to bargain, through union representatives, with their employer on pay issues, benefit levels, and working conditions toward a mutually beneficial outcome for both the employee and the employer.

Los Angeles County, therefore, has two forms of employee protection: civil service rules and collective bargaining. The application of the Fair Labor Standards Act is totally unnecessary, and a third layer of protection for our employees. In comparing the public to the private sector, while collective bargaining is available, certainly, to the private sector, private employees do not have the significant protections afforded by the civil service system.

Let me just also go over some of the major problems, and I will try to be very brief.

Generally, the act requires overtime to be paid at time and one-half to employees who do not qualify as executive, administrative, or professional personnel. It requires certain meal and sleep time, travel time, waiting time, standby time, and preparation time to be considered as time worked.

The act also requires all employees to be paid at least the minimum wage—that is not a problem. Finally, the act is very specific as to what constitutes a volunteer. Several activities which the county previously viewed as voluntary are now compensable, at the minimum wage, and sometimes at time and a half under FLSA.

There are a number of services that are required to be provided by the county of Los Angeles outside the normal 40-hour workweek. Prior to the *Garcia* decision, the county compensated overtime hours in a variety of ways, including pay at time and a half, compensatory time off, straight time, or a special premium rate, all as a result of collective bargaining. The county and its employees had mutually agreed to accept one or all of these various forms of compensation.

The variety of these arrangements used in our county reflect both the desires of the workers involved and the unique needs of the many services provided.

Since the Fair Labor Standards Act excludes all but paid time and a half as an overtime option, we will have to renegotiate our contracts with these 60,000 employees.

Although I am sure that many employees like being paid time and a half for overtime, there are others who would rather, believe it or not, have compensatory time off; and many of the representatives of our labor organizations that I have spoken with, just prior to coming here, as a matter of fact, told me, very frankly, that because of pressure from their national organizations, they are unable to speak out freely and frankly, but they do prefer the option of having available for them compensatory time off.

The implementation problems which we will face and some of the examples are as follows: Please keep in mind that private employers are not mandated to provide essential public services on a 24-hour, 7-day-a-week basis. Fire, flood, murder, mayhem, auto accidents, fruit fly infestations, and disease outbreaks, which I'm sure many of you have heard about recently in Los Angeles County, do not respect the 8 to 5 workday.

The following examples demonstrate how FLSA coverage will substantially increase costs to the county: In fire protection; Los Angeles County has a Mediterranean climate. It receives almost no rainfall for about 6 months a year. These hot, dry, and windy climatic conditions, coupled with vast stretches of chaparral, create incredible fire conditions. Consequently, our fire department's 2,000 employees work considerable overtime to protect lives and property from fire.

Additionally, our standby usage increases dramatically during the summer and fall months. During the first 10 days of southern California's fire season, fire damage has consumed 190,000 acres, 137 residences and 11 structures. Only five lives have been lost,

which is remarkable considering the proximity of brush areas to urban population centers.

The job is not over, however, when the fire is put out. Our forest units have to quickly begin replanting to avoid the problem of winter flooding and landslides.

The Fair Labor Standards Act may require us to count standby time as hours worked, and will require us to compensate overtime at time and one-half.

The FLSA requirements will cost the county of Los Angeles an additional \$12.5 million per year for fire protection. In just one 18-day period during the end of June and the beginning of July, the Los Angeles County Fire Department incurred an additional unbudgeted cost for overtime totalling \$564,000.

In law enforcement, the county sheriff's department has special investigative teams which are assigned to investigate illegal activities. These investigations often require prolonged periods of undercover observance and information gathering. Many weeks of continuous surveillance, which includes considerable overtime, are necessary in order to establish grounds for arrests.

Before FLSA, a single team of officers would run an entire investigation from planning to conviction. Now, operations of this type will be manned by several rotating teams of officers so that overtime costs will be minimized. This jeopardizes the continuity of undercover operations and, ultimately, the integrity of the critical information gathered in the conviction process.

Deputy sheriffs assigned to custody duty in county jails are eager to gain experience in patrol duty, and have been allowed to ride along in patrol cars to enhance their training. These deputy sheriffs volunteer to ride in patrol cars as the second officer during off-duty hours.

Rather than suffer the considerable overtime penalty, the sheriff is eliminating this program in Los Angeles County. The program was not only a valuable learning tool, but it provided added police protection to the community. We estimate the overall FLSA overtime requirements for the sheriff to be \$8.5 million annually.

One of the other very important things, and I will skip some of these others because I know you have a time problem, but Los Angeles County operates two court systems, the municipal and the superior. In 1985 we have budgeted for 922,551 juror days. Currently, jurors are compensated at \$10 a day for their services.

If they are considered employees under the Fair Labor Standards Act, the county will have to pay them a minimum wage. Increased costs to the county will be \$6.2 million. This is another example of the act's intrusion into what most people consider to be a civic responsibility.

Statewide, in 1981-82, California spent \$100 million to eradicate the Medfly—we all heard a lot about it. It turned out as State administration. Projected losses, in the event that the eradication efforts were unsuccessful, were set at \$1 billion. This eradication would not have been possible without the heavy use of overtime.

These are just some of the ways that the county of Los Angeles, its employees and its residents will be affected by FLSA. It is very likely that the person this Act sets out to protect will be the even-

tual loser. That is to say, the employee will likely be the one to suffer in the long run.

Let me conclude, gentlemen, by saying that as you deliberate this issue, I would urge you to consider the realities of state and local government finance and service requirements at a time when we are bracing for the shock of the loss of Federal revenue sharing, an \$80 million problem to the county of Los Angeles, which we use for indigent health care.

It is difficult, under the best of circumstances, to manage the delivery of services to the 8 million residents of our county. You have it, in your province, to relieve us of this silliness, allowing us to concentrate on the serious issues of expanding service requirements, many of which are already Federal in origin, with diminishing resources.

Thank you very much for the time. I would be happy to answer any questions.

[The prepared statement of Mr. Hankla follows:]

**NATIONAL
ASSOCIATION
of
COUNTIES**

*440 First St. NW, Washington, DC 20001
202/393-6226*

STATEMENT OF

JAMES C. HANKLA

CHIEF ADMINISTRATIVE OFFICER
LOS ANGELES COUNTY, CALIFORNIA

ON BEHALF OF

THE NATIONAL ASSOCIATION OF COUNTIES

BEFORE THE

SUBCOMMITTEE ON LABOR AND HUMAN RESOURCES

U. S. SENATE

JULY 25, 1985

WASHINGTON, D.C.

Mr. Chairman and members of the Subcommittee:

Thank you for this opportunity to testify. I am James C. Hankla, the Chief Administrative Officer for the County of Los Angeles. I am here to express the concerns of the Los Angeles County Board of Supervisors regarding the recent Garcia decision and its required implementation of the Fair Labor Standards Act (FLSA).

COUNTY OPERATIONAL OVERVIEW

So that you will have a better understanding of our operations, let me give you a brief overview of the County. First of all, Los Angeles County has almost eight million residents and is larger in population than 42 of the 50 states. It is spread over 4,083 square miles and accounts for roughly one-third of the state's workforce. The County has within its boundaries 84 incorporated cities covering about 1,000 square miles. In the remaining unincorporated area, the County Board of Supervisors serves as the "city council" to over one million residents for whom County departments provide municipal type services such as police, fire protection, road and library services.

Beyond these municipal services, Los Angeles County provides a wide range of services to all of its residents in both the unincorporated and incorporated areas. These services can be divided into three categories:

-- human services, including health and mental health, welfare

and social services, the criminal and civil justice system and disaster planning and response;

- government services, such as administering the property tax system, voter registration and elections, recording and storing vital statistics and property documents; and
- countywide cultural and recreational services.

These services are provided by the County's over 72,000 employees with the assistance of thousands of volunteers.

FISCAL OVERVIEW

The Garcia decision will cost Los Angeles County government more than \$50 million per year. Although Los Angeles County has an adopted budget for 1985-86 of over \$6.7 billion, we will be unable to absorb this cost increase without making major service cuts.

Proposition 13, which started a nationwide tax limitation movement in 1978, left us with no independent revenue raising authority. Since 1979-80 our local costs for welfare, jails and courts have gone up 115%, 106% and 76% respectively, but our local revenues have gone up by only 58% and our surplus has been totally exhausted. This latter item is most critical because California counties must adopt balanced budgets and must end the fiscal year in the black. The 1985-86 Los Angeles County budget contains no funding for Fair Labor Standards Act (FLSA) cost

increases, and, for the second time in 3 years, no funding for employee cost of living adjustments, simply because there is no money available. Any unavoidable FLSA-related cost increase will have to be absorbed by workforce and service reductions throughout the County.

I want to assure you that Los Angeles County will give priority to the most critical public protection services. We will not shirk our essential duties concerning law enforcement, public health, child abuse prevention, urban and wildland brush fires and other natural disasters. The fiscal shoe will have to pinch elsewhere, to the detriment of the public employees whom the FLSA ostensibly protects and to the detriment of the public who will receive a lower level of service because of our inability to raise taxes.

CURRENT EMPLOYEE PROTECTIONS

I would like to quickly review the protections currently in place for all County employees throughout California.

Local government in California has long been known for its fair and equitable treatment of its employees. Los Angeles County provides comprehensive civil service procedures for addressing the grievances of County employees as well as ensuring their rights to due process in all disputes.

The County also participates in collective bargaining. This

allows employees to bargain, through union representatives, with their employer on pay issues, benefit levels and working conditions toward a mutually beneficial outcome for both the employee and the employer.

Los Angeles County, therefore, has two forms of employee protection: civil service rules and collective bargaining. The application of the Fair Labor Standards Act is a totally unnecessary third layer of "protection" for our employees. In comparing the public to the private sector, while collective bargaining is available, private employees do not have the significant protections afforded by the civil service system.

FAIR LABOR STANDARDS ACT REQUIREMENTS

Generally, the Act requires overtime to be paid at time and one-half to employees who do not qualify as executive, administrative or professional personnel. It requires certain meal and sleep time, travel time, waiting time, stand-by time and preparation time to be considered as time worked. The Act also requires all employees to be paid at least the minimum wage. Finally, the Act is very specific as to what constitutes a volunteer. Several activities which the County previously viewed as voluntary are now compensable at minimum wage and sometimes time and one-half under FLSA.

There are a number of services that are required to be provided by Los Angeles County outside the normal 40-hour work week.

Prior to the Garcia decision, the County compensated overtime hours in a variety of ways including pay at time and one-half, compensatory time off, a straight time rate or a special premium rate. Through collective bargaining, the County and its employees have mutually agreed to accept one or all of these forms of payment for time worked. The variety of these arrangements used in our County reflect both the desires of the workers involved and the unique needs of the many different services we provide.

Since the Fair Labor Standards Act excludes all but paid time and one-half as an overtime option, we will have to renegotiate our contracts with approximately 60,000 employees.

Although I am sure that many employees like being paid time and one-half for overtime, there are others who would rather have compensatory time off. The Act removes the ability of an employee to make that choice. Time has become as important a commodity as money to many because of the stress of modern life. For many employees additional time off with their families or to pursue other interests is essential in providing relief from job stress or for regenerating after long periods of intensive duty. Compensatory time off is particularly important for law enforcement and firefighting personnel.

IMPLEMENTATION PROBLEMS

I would like to share with you some examples of the problems we

are facing in implementing the Fair Labor Standards Act. Please keep in mind that private employers are not mandated to provide essential public services on a 24 hour, 7 day a week basis. Fire, flood, murder, mayhem, auto accidents, fruit fly infestations and disease outbreaks frequently do not fall within the normal workday hours of 8 a.m. and 5 p.m., Monday through Friday.

The following examples demonstrate how FLSA coverage will substantially increase costs to the County as well as jeopardize services on which the public depends.

1. Fire Protection

Los Angeles County has a Mediterranean climate. It receives almost no rainfall for about six months of the year. These hot, dry and windy climatic conditions coupled with vast stretches of chaparral create the perfect combination for fueling wildland fires every year in Southern California. Consequently our Fire Department's 2,000 employees work considerable overtime to protect lives and property from fire. Additionally, our stand-by time usage increases dramatically during the summer and fall months. During the first ten days of Southern California's fire season, fire damage has consumed 190,000 acres, 137 residences and 11 structures. Only 5 lives have been lost, which is remarkable considering the proximity of brush areas to urban population centers. The job is not over when the fire is put out. Our forestry unit works con-

siderable overtime cleaning up after the fire and quickly replanting the burned out area to reduce the risk of winter flooding and landslides. The Fair Labor Standards Act may require us to count stand-by time as hours worked and it will require us to compensate overtime at time and one-half.

The FLSA overtime requirements will cost Los Angeles County an additional \$12.5 million per year for fire protection. In just one 18-day period during the end of June and the beginning of July, the Los Angeles County Fire Department incurred an additional and unbudgeted cost for overtime totalling \$564,000. This is a graphic example of the impact that FLSA is already having on local government.

Similarly, the FLSA has increased by \$6 million the cost incurred by the State Department of Forestry for fighting the recent California brush and forest fires.

2. Law Enforcement

The Los Angeles County Sheriff's Department has special investigation teams which are assigned to investigate illegal activities. These investigations often require prolonged periods of undercover observance and information gathering. Many weeks of continuous surveillance, which includes considerable overtime, are necessary in order to establish grounds for arrest. Before the Fair Labor Standards Act, a

single team of officers would run an entire investigation from planning and arrest to conviction. Now operations of this type will be manned by several rotating teams of officers so that the overtime costs will be minimized. This jeopardizes the continuity of the undercover operation and ultimately the integrity of the critical information gathered for the conviction process.

Deputy sheriffs assigned to custody duty in County jails are eager to gain experience in patrol duty and have been allowed to ride-along in patrol cars to enhance their training. These deputy sheriffs volunteer to ride in patrol cars as the second officer during off-duty hours. Rather than suffer the considerable overtime penalty, the Sheriff is eliminating this program in Los Angeles County. The program was not only a valuable learning tool, but it provided added police protection to the community.

The overall FLSA overtime requirements for the Sheriff's Department is estimated to cost \$8.5 million annually.

3. Election Services

The Registrar-Recorder in Los Angeles County has a critically important job during election time. There are approximately 3.5 million registered voters in the County and it is the Registrar's job to make sure that sample ballots, absentee ballots and information on ballot propositions are mailed in

a timely manner and that the votes are all counted properly in as little time as possible. On election night, approximately 1,000 County employees work at special straight time rates in support of the national, state and local election process. Additionally, there are 6,456 polling places with over 32,000 precinct officers who receive only an honorarium for volunteering to perform what many consider to be their civic duty. The Fair Labor Standards Act could require a minimum wage or an overtime wage to be paid to all of these people. This will increase the cost of statewide and municipal elections in Los Angeles County by almost \$1 million every fiscal year.

4. Tax Collections

The Treasurer/Tax Collector in Los Angeles County processes 2.7 million property tax payments per year for a total of \$2.9 billion. This workload peaks in two six-week periods each year (December and April) during which more than 60% of the annual workload takes place. More than 1,000 local cities, schools and special districts depend on the efficiency of the tax collection system for prompt receipt of the taxes due them. The County has streamlined its operation to the point that all payments received are processed and deposited on the day received. This would be impossible to maintain without overtime in peak periods. The overtime, which is usually compensated with compensatory time off,

would be required to be paid at time and one-half under the Fair Labor Standards Act.

5. Alcohol and Drug Abuse Rehabilitation

The County has a rural rehabilitation center which provides alcohol and drug abuse rehabilitation to patients. One form of rehabilitation is the "patient helper" program, which allows approximately 400 patients to perform various tasks such as plumbing, repair, maintenance, cooking, and truck driving. These tasks are an invaluable form of therapy to help patients get back into the mainstream of life. The patient helpers are paid between 50¢ and 80¢ an hour. The Fair Labor Standards Act considers these patients to be "employees" and requires that they be paid a minimum wage, currently \$3.35 per hour. The additional cost may make this valuable therapeutic program infeasible.

6. Court Operations

Los Angeles County operates two court systems: Municipal and Superior. In 1985 we have budgeted 922,551 juror days. Currently, jurors are compensated \$10 a day for their services. If they are considered employees under the Fair Labor Standards Act, the County will have to pay them a minimum wage. Increased costs to the County will be \$6.2 million. This is another example of the Act's intrusion into what most people consider to be a civic duty and a cor-

nerstone of our participatory democracy.

7. Pest Infestation

Statewide, California spent \$100 million to eradicate the 1981-82 Medfly infestation. Projected losses, in the event that the eradication efforts were unsuccessful, were set at \$1 billion. This eradication would not have been possible without the heavy use of overtime.

These are just some of the ways that Los Angeles County, its employees and its residents will be affected by the FLSA. It is very likely that the person this Act sets out to protect will be the eventual loser. That is to say, the employee will likely be the one to suffer in the end, along with the public.

CONCLUSION

The Los Angeles County Board of Supervisors opposes the application of the Fair Labor Standards Act to state and local governments. It is a costly and unnecessary burden on government, its employees and its taxpayers.

Los Angeles County has already severely restricted overtime in lower priority job category areas. Because of these restrictions, some employees enjoyed better overtime benefits before the Garcia decision than they do now. In essential public protection services, where we cannot avoid the over-

time penalties, our only option to compensate for these costs will be to reduce the number of employees and to increase the workload of remaining employees. This adversely affects both employees and the public, which goes against the original intent of the Act.

Throughout this statement I have described how County services are affected by the Fair Labor Standards Act, particularly its overtime requirements. I cannot forecast exactly what services may be reduced, that is up to our Board of Supervisors to decide. Eventually, however, some aspects of County services will suffer.

Throughout the country, the Fair Labor Standards Act will become a burden on our citizens. State and local governments either have to increase taxes to maintain services, or reduce services to live within the increased costs of the Act.

As I conclude my statement I hope you will seriously consider legislation to relieve local governments and local taxpayers from the severe fiscal consequences of the Garcia decision. I believe Senator Wilson's bill S 1434 provides the kind of relief we are seeking. I hope that you will support this bill or similar legislation.

Senator NICKLES. Thank you very much, Mr. Hankla.
Mr. Forbes.

Mr. FORBES. My name is Frank Forbes, and I am from Gainesville, FL, assistant city manager there. I am here representing two national public management organizations today.

In the interest of time, I will summarize verbally my written remarks.

I think it's fair to say that, on behalf of public management, that there are a host of negative effects from the *Garcia* decision. I think, logically, they fall in three areas: One of those, really, is the traditional Federalist approach; our understanding of the separation of powers between the Federal and the local governments. That's been extensively commented upon earlier today, and I won't say anything more about it. The remarks cover it in some detail.

The second area, I think, ironically, the decision has the effect of undermining the collective-bargaining process. I say, "ironically," because I think that was not the intent of organized labor when they supported the amendment in 1974. I did not hear that from organized labor earlier today. It undermines it because we, at the local level of government, by and large, do negotiate in good faith across this country with elected representatives of our employees.

For example, in Gainesville, some 90 percent of our employees are covered by collective-bargaining agreements, including the International Association of Fire Fighters. This decision precludes our ability to negotiate in good faith in a wide area, including overtime, compensatory time, and scheduling.

For example, with our police union, we have negotiated, before the *Garcia* decision, a provision that would provide for \$225 a month additional payment for narcotics officers in lieu of overtime. This, then, allowed the police department to schedule and track some delicate drug cases without having to, if you will, clock the hours. This is acceptable to organized labor; in fact, it was quite a benefit. As a result of *Garcia*, that's now an illegal provision. Instead, we must be in the position of paying time and a half pay for all those hours beyond the required in the act. Ironically, the Federal Government does not have the same provisions for the FBI and the DEA—we would bring that to the committee's attention.

Senator NICKLES. A good point.

Mr. FORBES. Similarly, another area of dramatic impacts is economic. Again, it's been fairly well documented—let me give you the example of Gainesville, FL. We are not a large city. Our impact with collective bargaining will only be, quote, unquote, \$150,000. However, that \$150,000 is not money that has been budgeted. It means a real service cut in one or more operations for the taxpayers, at least until such time as the elected officials can choose to either add more people or increase taxes, or continue that temporary service cut, which we must pass on in order to meet provisions of the act.

As you look to alternatives, we stand ready to work with you, as representatives of public management. We are not anticollective bargaining, but we are pro solving problems at the local level.

Thank you.

[The prepared statement of Mr. Forbes with attachments follow:]



NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

1620 Eye Street, N.W. • Fourth Floor • Washington, D.C. 20006 • (202) 296-2230

Statement By

Frank H. Forbes, Jr.

Acting Assistant City Manager

City of Gainesville, Florida

On Behalf Of The

National Public Employer Labor Relations Association (NPELRA)

and

International City Management Association (ICMA)

Before The

Subcommittee on Labor

Committee On Labor And Human Resources

United States Senate

July 25, 1985

Chairman Nickles and Members of the Subcommittee, I am Frank H. Forbes, Jr., Acting Assistant City Manager of Gainesville, Florida. I am pleased and honored to have the opportunity to appear before you today to testify on the effects of the recent U. S. Supreme Court decision in Garcia v San Antonio Metropolitan Transit Authority.

My remarks are on behalf of two national associations representing public management at local levels of government. The National Public Employer Labor Relations Association (NPFLRA) is an organization of individuals who negotiate labor agreements for public management. It's membership covers every level of government with concentrations in city, county and state levels. The International City Management Association (ICMA) is the professional association of appointed administrators serving cities, counties, regional councils and other local governments. It's goals include strengthening the quality of local government through professional management.

Today, I would like to share some views of public management on the consequences of the Garcia decision and request your active intervention to amend the Fair Labor Standards Act to alleviate the negative impacts. Further, we hope each of you can support our recommendations to the Department of Labor to clarify rules and regulations which apply to state and local governments. I have attached a copy of our recommended rule clarifications and ask that they be made a part of the record for this testimony.

The Garcia decision has far reaching negative impacts for local governments. There are at least three areas where these effects are greatest. First, is the area of federalism where the case establishes a dangerous level of congressional interference in the day-to-day operations of local government. A second area of concern is the undermining of the collective bargaining process. Finally, the economic impacts are substantial at a time when most local jurisdictions are not able to raise taxes for the same level of service.

Federalism, the relationship of state and local jurisdictions to the national level of government, is an area of debate spanning the entire history of our country. James Madison wrote in the Federalist, Number 45, "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be connected. The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State."

In recent years there has been broad agreement that the national government should not interfere with the day-to-day

operations of local levels of government without overriding constitutional concerns such as the right to vote. This consensus has been affirmed time and again at the ballot box and in the courts. Our current national administration is on record to strengthen local government. This case represents a potentially dangerous level of intrusion in these local day-to-day operations. We hope Congress will rectify this.

The second area of concern is the collective bargaining process. NPELRA supports collective bargaining and a majority of state legislatures have supported collective bargaining by passing legislation giving public employees the right to bargain collectively. This decision in Garcia undermines the collective bargaining process. No longer can public sector, labor and management negotiate overtime provisions suited to their unique operations. Instead, the U.S. government through the Department of Labor will mandate these provisions.

For example, in Gainesville Florida, the police union, represented by the Police Benevolent Association and the city negotiated a provision to pay narcotics officers an additional \$225.00 per month in lieu of overtime. The Garcia case has made this provision illegal. We must now pay 1 1/2 times the regular hourly rate of pay for all overtime. Thus, drug investigations and related undercover operations will be curtailed. It is interesting to note that neither the FBI nor the DEA are required to meet this same standard.

In numerous cities, counties and states agreements have been negotiated to provide for compensatory time off rather than cash overtime payment. This gives the employees flexibility to have more vacation time or other days off with pay; and the employer saves cash. No one is taking advantage of the other and the arrangements frequently are negotiated with the unions.

Financially, most cities cannot meet the immediate costs of the change without reducing services. No phase-in period has been allowed despite clear Congressional intent in the 1974 amendments. Instead, jurisdictions must begin paying effective April 15, 1985 even though they legally cannot raise taxes until the next fiscal year. The result will be a reduction of local government services mandated by the "feds".

City budgets are not overflowing. There have been numerous cuts in the federal and state revenues. In addition, local tax limitations, inflation and other economic factors have severely limited revenues. Other proposals are pending which would further hamper our ability to finance service delivery.

To this bleak financial picture, we must add the costs of the Garcia decision. According to preliminary estimates the case will cost affected government jurisdictions somewhere from \$1 to \$3 billion. In Gainesville our costs are projected to be up to \$150,000, which may not seem high, except that it is not budgeted and means service must be reduced to generate the

additional monies. I have attached a partial list of cities which have responded to NPELRA's request for specific dollar impacts. Again, I would like to ask that it be made a part of the record.

What can be done to alleviate these negative effects? We have been unsuccessful to date with our requests for administrative relief. Therefore, Congress is the appropriate avenue to address our concerns.

Clearly, there are a range of legislative alternatives to consider:

- ___ exempt all state and local government employees from FLSA;
- ___ exempt public safety, fire and police,
- ___ allow for collective bargaining provisions to supercede the FLSA; and
- ___ mandate a two or three year phase in period so that revenues may be adjusted logically.

Most local government officials prefer the first option, that is, exempt all state and local government employees. This option is consistent with the principles of federalism, protects the collective bargaining process and does not further disrupt the economic conditions of local governments. Both ICMA and NPELRA stand ready to work with you and your staff to solve these issues.

ATTACHMENT I

Proposed Amendments To
The Department of Labor's
Fair Labor Standards Act Regulation
Presented to DOL June, 1985 by
Public Interest Group Coalition

JURORS, WITNESSES, AND ELECTION WORKERS

Jurors, witnesses, election workers, and similar individuals who receive a per diem fee for public service work are not expressly excluded from the definition of an employee for purposes of the FLSA. The regulations should be amended to make clear that state and local governments are not required to pay the minimum wage or overtime compensation to individuals engaged in such public service activities.

A new section should be added to Part 776 to make clear that jurors, witnesses, and election workers are not classified as employees for purposes of the FLSA:

Subpart C--Governmental EntitiesSec. 776.31 Public service work for governmental entities.

For purposes of the Fair Labor Standards Act, the term "employee" does not include a person who acts as a juror, witness, or election worker, or who serves in a similar public service capacity and who is compensated on a fee basis (whether per diem or otherwise), by the Government of the United States, a State, a political subdivision of a State, or an interstate governmental agency.

SEASONAL ESTABLISHMENTS

Section 13(a)(3) exempts employees of recreational or amusement establishments which operate on a seasonal basis (e.g., golf courses, swimming pools) from the minimum wage and overtime provisions of the FLSA. Seasonal establishments operated by states and localities should be eligible for this exemption in cases in which the establishment's facilities are physically part of a larger facility, such as a park, which is open year round and may not qualify for the section 13(a)(3) exemption on its own. Generally, private sector employers can qualify for the seasonal exemption by such means as the establishment of separate corporations. Marshall v. New Hampshire Jockey Club, Inc., 562 F.2d 1323 (1st Cir. 1977). However, it is far more difficult for governmental entities to establish separate corporations and, as a result, regulations designed to accommodate the special problems of governmental entities are necessary.

A new section should be added to Part 776 which ensures that governmental entities may utilize the section 13(a)(3) exemption:

Sec. 776.32 Seasonal establishments operated by governmental entities.

The term "amusement or recreational establishment" for purposes of section 13(a)(3) of the Fair Labor Standards Act (29 USC 213(a)(3)) may include a facility operated on a seasonal basis by the Government of the United States, a State, a political subdivision of a State, or an interstate governmental agency which is used for related but separate purposes at different seasons or which is part of a larger facility that does not qualify for the section 13(a)(3) exemption by itself.

MEAL AND SLEEP TIME

Meal and sleep time are subject to completely different treatment under the regulations depending upon whether the employee is a public safety employee or some other type of employee:

Meal Time

- o For police officers and firefighters, meal time is not compensable time only when:
 - (1) the employee is not required to perform duties while eating;
 - (2) the employer and employee agree to exclude meal time from compensable time;
 - (3) the employee is not required to perform duties while eating; and
 - (4) the shift is more than 24 hours. 29 CFR 553.15.
- o For other employees, meal time is not compensable time when:
 - (1) the employee is not required to perform duties while eating. 29 CFR 785.19.

Sleep Time

- o For police officers and firefighters who work declared work periods under section 7(k), sleep time is not compensable time only when:
 - (1) the duty period is more than 24 hours;
 - (2) sleep time is not interrupted by a call to duty for at least five hours; and
 - (3) the employer and employee agree to ~~exclude~~ sleep time. 29 CFR 553.15.
- o For other employees, sleep time is not compensable time when:
 - (1) the duty period is 24 hours or more; and
 - (2) sleep time is not interrupted by a call to duty for at least five hours. 29 CFR 785.22.

It is useful to compare the maximum number of hours permissible under existing regulations with those which would have been permitted under the legislation initially approved by the Senate but later rejected by the conferees in favor of a compromise intended to provide state and local government with greater protection.

The bill initially approved by the Senate (S. 2747) extended the overtime provisions of the FLSA to police officers and firefighters. However, the legislation provided public sector employers with some flexibility by permitting the establishment of 28-day work periods of 160 hours by employer-employee agreement.

According to the Senate Committee on Labor and Public Welfare (S. Rep. No. 690, 93th Cong., 2d Sess. 25), the committee intended that the provisions of 29 CFR 785.22 providing for the exclusion of regularly scheduled sleep and meal time for employees who are on duty for 24 hours or more "should be applicable to the numerous local firefighting units which work 24 hour shifts."

Thus, under the legislation initially approved by the Senate, a firefighter could be required to work up to twelve 24-hour shifts in a 28-day period (i.e., 24 hours - (8 hours of sleep time + 3 hours of meal time) x 12 = 156 hours) before being paid overtime compensation.

The bill initially approved by the House (H.R. 12435) included a complete exemption for state and local public safety employees.

The conferees adopted a provision for public safety employees which was intended to be a compromise between the House measure, providing for no overtime pay, and the Senate bill, allowing for twelve 24-hour shifts in a 28-day period before the payment of overtime compensation was required. Under this provision, which did not take effect until January 1, 1975 (eight months after the May 1, 1974 effective date of the 1974 FLSA amendments), state and local governments were permitted to establish work periods of from seven to 28 days for police officers and firefighters.

The number of hours which could be worked in a 28-day period before overtime compensation had to be paid was initially set at 240 and gradually reduced over a three year period to the lesser of 216 hours or the average number of hours worked by firefighters and police officers as determined by a DOL study. In 1983, the results of that study were released, establishing 212 and 171 as the maximum number of hours which could be worked by firefighters and police officers in a 28-day period before overtime compensation must be paid.

According to the Conference Committee Report,

The conference substitute departs from the standard FLSA "hours of work" concept directed primarily at industrial and agricultural occupations and adopts an overtime standard keyed to the length of the tours of duty, thereby reflecting the uniqueness of firefighting service. The (DOL) Secretary is directed to adopt regulations implementing these new and unique provisions, including regulations defining what constitutes a tour of duty. S. Rep. No. 758, 93d Cong., 2d Sess. 27.

On the House floor, this provision was described by the ranking minority member of the House Committee on Education and Labor as "something part way between the Senate version and complete exemption" and as authorizing the DOL Secretary to determine by regulation "what hours are included as hours of duty." 120 Cong. Rec. H2295 (daily ed. March 28, 1974) (statement of Rep. Quie).

Thus, it is clear that Congress intended to give DOL broad discretion in defining the hours to be considered compensable time, including the extent to which hours during 24-hour shifts could be excluded from compensable time. Of great importance,

however, is the fact that the final law was a compromise between House and Senate versions of the legislation and therefore Congress did not intend to authorize the adoption of regulations by DOL which are more restrictive for state and local government than the original Senate-passed legislation.

Existing DOL regulations are considerably more onerous for states and localities than the original Senate bill. Under section 553.15, a state or local employer is prohibited from excluding meal or sleep time in any case in which the duty shifts for police officers or firefighters are 24 hours or less. As a result, a city must pay firefighters overtime compensation if they are on duty for nine 24-hour shifts in a 28-day work period (i.e., $9 \times 24 \text{ hours} = 216$ or four hours more than the maximum allowable 212 hours). Thus, a state or local employer can presently require a maximum of only eight 24-hour shifts in a 28-day work period if overtime pay is to be avoided.

As previously indicated, under the original Senate bill, the employer could require as many as twelve 24-hour shifts in a 28-day work period without paying overtime. Clearly section 553.15 should be revised to ensure that DOL's regulations are not more onerous for state and local governments than the legislation originally passed by the Senate which was later modified in conference to minimize the adverse impact on states and localities.

- o For police officers and firefighters, meal time should not be compensable time when the employee is not required to perform duties while eating (i.e., section 553.15 should be consistent with sections 785.19 and .22).
- o For police officers and firefighters, sleep time should not be compensable when:
 - (1) the duty period is 24 hours or more; and
 - (2) sleep time is not interrupted by a call to duty for at least five hours (i.e., section 553.15 should be consistent with section 785.22).

The following changes should be made to section 553.15:

Sec. 553.15 Sleeping and meal time as compensable hours of work.

(a) Where the employer has elected to use the section 7(k) exemption, sleep and meal time cannot be excluded from compensable hours of work where (1) the employee is on duty for less than 24 hours, which is the general rule applicable to all employees (29 CFR 785.21) and (2) where the employee is on duty for exactly 24 hours, which represents a departure from 29 CFR 785.21. A bona fide meal period, however, may be excluded from compensable hours of work under the section 7(k) exemption unless the meal period is interrupted by a call to duty where the employee is on duty for less than 24 hours.

(b) Sleep and meal time may, however, be excluded in the case of fire protection or law enforcement employees who are on duty for more than 24 hours or more, but only if there is an express or implied agreement between the employer and the employee to exclude such time. In the absence of any such agreement, sleep and meal time will constitute hours of work provided that, in the case of meal time, the meal period is not interrupted by a call to duty and, in the case of sleep time, if on the other hand, the agreement provides for the exclusion of sleep time (1) the amount of such time shall, in no event, exceed 8 hours, in a 24-hour period, which is also the amount of time permitted when the agreement fails to specify the duration of sleep time (2) If such sleep time is interrupted by a call to duty, the interruption must be counted as hours worked, and (3) if the period is interrupted to such an extent that the employee cannot get a reasonable night's sleep (which for enforcement purposes, means at least 5 hours), the entire time must be counted as hours of work.

STANDBY TIME

Section 553.14 states that "a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness" must be compensated for that period of waiting time. Section 785.17 establishes less restrictive standards for the treatment of on-call time as compensable time for other employees. Similarly,

5 CFR 551.431(b)(1) establishes very clear standards for the exclusion of on call time for federal employees from compensable time (i.e., an employee is considered off duty if allowed to leave a telephone number or carry a beeper, even if required to remain within a "reasonable call-back radius").

Sections 553.14 and 785.17 should be clarified to ensure that on call time is not defined as compensable time:

Sec. 553.14 General rules for determining compensable hours of work.

(a) Compensable hours of work generally include all of that time during which an employee is on duty or on the employer's premises or at a prescribed workplace, as well as all other time during which the employee is suffered or permitted to work for the employer. Such hours include all pre-shift and post-shift activities which are an integral part of the employee's principal activity or which are closely related and to its performance, such as attending roll call, writing up and completing reports or tickets, and washing and re-racking fire hose. It also includes time which an employee spends in attending required training classes. See Sec. 553.7. Time spent away from the employer's premises under conditions so circumscribed that they restrict the employee from effectively using the time for personal pursuits, also constitutes compensable hours of work. For example, a police officer who is required to remain at home until summoned to testify in a pending court case and who must be in a constant state of instant readiness, is engaged in compensable hours of work. On the other hand, However, employees who are confined to barracks while attending police academies are not on duty during those times when they are not in class or at a training session since they are free to use such time for personal pursuits. This would also be true in a forest fire situation where employees, who have been relieved from duty and are transported away from the fire line, are, for all practical purposes, required to remain at the fire camp because their homes are too far distant for commuting purposes. Also a police officer who has completed his or her tour of duty but who is given a patrol car to drive home and use on private business, is not working simply because the radio must be left on so that the officer can respond to emergency calls. Of course, the time spent in responding

to such calls would be compensable, except in those cases where it is miniscule and cannot, as an administrative matter, be recorded for payroll purposes. Employees engaged in fire protection or law enforcement activities shall be considered off duty when required to leave a telephone number or to carry an electronic device for the purpose of being contacted, even though the employee is required to remain within a reasonable call-back radius.

Sec. 785.17 On-call time.

An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call". An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached or to leave a telephone number or to carry an electronic device for the purpose of being contacted is not working while on call even if required to remain within a reasonable call-back radius.

JOINT EMPLOYMENT

Section 553.9(a) precludes a state or local government from using the section 7(k) exemption for any of the employee's hours in cases in which a public safety employee has a second nonexempt job in another department of the governmental entity. Similarly, a state or local government cannot use the section 13(a)(3) exemption for an employee of a seasonal establishment who has a second job as a police officer or firefighter.

According to the legislative history, DOL should not have precluded the use of the section 7(k) and section 13(a)(3) exemptions in cases in which the employee works for two or more departments of the governmental entity. The following discussion on the House floor is indicative of congressional intent:

MR. SEBELIUS. Mr. Speaker, I thank the gentleman for yielding.

May I propose a question to the gentleman or to the subcommittee chairman on the subject of small towns? I have hundreds of them in my district where they have one or two employees and one of them may also be the town marshall who works 8 hours a day. It looks like he

is exempt that way, but he is also the water commissioner and is on call if a watermeter breaks. What is the situation of that employee in those small towns?

MR. QUIE. Mr. Speaker, I would say that as town constable, he is exempted, but I would imagine that all the work he does, as reading water meters would not be. In other words, he is not exempted from the overtime provision in his nonpublic safety duties. 120 Cong. Rec. H2301 (daily ed. March 28, 1974).

Section 553.9(a) should be revised to allow for the proration of overtime hours between the two jobs and continued use of the section 7(k) partial exemption for the hours worked as a public safety employee and the section 13(a) (3) exemption for the hours worked as a seasonal establishment employee:

Sec. 553.9 Fire protection or law enforcement employees who perform unrelated work for their own agency or for another public agency or private employer.

(a) If an employee regularly engaged in exempt fire protection or law enforcement activities also works for another department or agency of the same State or political subdivision, such employee ~~will lose~~ may not use the section 7(k) exemption if for the other work which is unrelated to fire protection or law enforcement activities. For example, if a city police officer also works as a clerk in the city health department, which is clearly nonexempt work, the city could not claim the section 7(k) exemption for such employee's hours worked in the health department and would have to pay overtime compensation for ~~all the~~ the hours worked for the ~~two agencies~~ health department in excess of the percentage of total hours worked represented by the hours worked in the health department 40 per week times 40. See 29 CFR 778.117 for an explanation of how overtime compensation is computed in such a situation. If, however, such employee's other job for the city is also exempt work, as, for example lifeguarding at a seasonally operated city beach which work is exempt from both the Act's minimum wage and overtime provisions by virtue of section 13(a) (3), the city would be entitled to ~~claim the lesser of~~ prorate the two exemptions on the basis of the percentage of total hours worked represented by the hours worked for each job which, in the example given would be the section 7(k) exemption, and it would not have to pay any overtime compensation only for the

combined hours (if any) of work which are in excess of the employee's tour of duty exempt under section 13(a)(3).

VOLUNTEERS

Section 553.11(a) treats "volunteer" firefighters as compensable employees (and therefore entitled to the minimum wage and overtime compensation) if they receive more than \$2.50 in cash per call unless the governing body establishes that expenses are in excess of \$2.50 per call.

Section 553.11(a) should be revised to establish an up-to-date standard for defining nominal compensation in 1985 dollars (i.e., \$10):

Sec. 553.11 Fire protection and law enforcement volunteers.

(a) Individuals who volunteer to perform fire protection or law enforcement activities, usually on a part-time basis and as a public service, are not considered to be employees of the public agency which receives their services. Such individuals do not lose their volunteer status because their tuition may have been paid or they may have been reimbursed for attending special classes or other training to learn about fire protection or law enforcement or because they are reimbursed for approximate out-of-pocket expenses incurred incidental to answering a call or to the cost of replacing clothing or other items of equipment which may have been consumed or damaged in responding to a call. Nor is the volunteer status of such individuals lost where the only material recognition afforded them is the holding of an annual party, the furnishing of a uniform and related equipment, or their inclusion in a retirement or relief fund, a workman's compensation plan or a life or health insurance program, or the payment of a nominal sum on a per call or other basis which may either be retained, in whole or in part, by the volunteer or donated to finance various social activities conducted by or under the auspices of the agency. Payments which average ~~\$2.50~~ \$10.00 per call will be considered nominal. Payments in excess of this amount may qualify as nominal, depending upon the distances which must be traveled and other expenses incurred by the volunteer. For purposes of this paragraph, it is not necessary for the agency to maintain an exact record of expenses.

ENFORCEMENT POLICY

Certain changes in Part 775 are necessary in light of the Garcia decision. Those include the elimination of the different treatment of traditional and nontraditional state and local employees for purposes of the FLSA and the need for the establishment of a policy for the enforcement of the FLSA with respect to state and local employers.

Sec. 775.2 Special enforcement policy concerning States and political subdivisions.

(a) On June 24, 1976, the United States Supreme Court ruled in National League of Cities, et al. v. Usery, 426 U.S. 833, that the minimum wage and overtime compensation provisions of the Fair Labor Standards Act (FLSA) are not constitutionally applicable to the integral operations of the States and their political subdivisions in areas of traditional governmental functions. Such areas include, among others, schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation. They do not include, among others, the operation of a railroad by a State, 426 U.S. at 854, no. 18. However, on February 19, 1985, the Supreme Court overruled the National League decision in Garcia v. San Antonio Metropolitan Transit Authority, U.S. . The effective date of the Garcia decision is April 15, 1985, the on which the Supreme Court issued its mandate in the case.

(b) In view of the National League and Garcia decisions, the Secretary will not file suit to enforce the minimum wage and overtime compensation provisions of the FLSA against a State or its political subdivisions unless at least 30 days notice has first been given that, in the opinion of the Administrator, the activities in question are not integral operations in areas of traditional governmental functions. Such notice will be provided either by specific notification of the employing body in question or by general notification by publication in the FEDERAL REGISTER in the form of amendments to section 775.3. A reasonable opportunity will be allowed the employing body, after the notification of the administrative determination, to come into compliance voluntarily before suit is brought.

(c) Each such notice will be made available to wage-hour reporting services and to any interested person or association, for information or further publication, except for deletions reasonably necessary to protect the privacy of individual employers and employees.

(d) Because of the complexity of the questions raised by the National League and Garcia decisions, it would be inappropriate to seek liquidated damages in addition to back pay in cases to enforce the minimum wage and overtime compensation provisions of the Act against States or their political subdivisions, except as to activities determined by prior controlling judicial decisions, or by prior administrative ruling published in the FEDERAL REGISTER, not to be integral operations in areas of traditional governmental functions. The Secretary will therefore not seek liquidated damages as to activities not covered by such decision or ruling, or for periods of employment prior to the publication of such decision or ruling. Additionally, any act or omission by a State or political subdivision shall be presumed to be in good faith in conformity with and in reliance on the Administrator's enforcement policy for purposes of the Portal-to-Portal Act of 1947 and 29 CFR 790.13 unless the employing body has received notice pursuant to paragraph (b) of the Secretary's intent to file a lawsuit against the employing body.

(e) As already noted, the National League decision applies only to the minimum wage and overtime compensation provisions of the FLSA . . .

Sec. 775.3 Nontraditional functions of States and their political subdivisions.

(a) In the National League decision, it was made clear that the operation of a railroad by a State or its political subdivision is not an integral operation in the area of traditional governmental functions, 426 U.S. 833, 854 n. 10.

(b) For the purpose of the notice referred to in section 775.2(b), the Administrator has determined that the following functions of a State or its political subdivision are not traditional. From time to time, this section will be amended to list other such functions determined not to be traditional. The date listed after each function is the date of original publication in the FEDERAL REGISTER. This is the effective date of the general notification described in section 775.2(b). However, where an employing body has actual notice on an earlier date of the position taken by the Administrator, that earlier date is the effective date of the specific notification described in section 775.2(b).

(1) Alcoholic beverage stores December 21, 1979.

(2) Off-track betting corporations December 21, 1979.

(3) Local mass transit systems December 21, 1979.

(4) Generation and distribution of electric power December 21, 1979.

(5) Provision of residential and commercial telephone and telegraphic communication December 21, 1979.

(6) Production and sale of organic fertilizer as a by-product of sewage processing December 21, 1979.

(7) Production, cultivation, growing or harvesting of agricultural commodities for sale to consumers December 21, 1979.

(8) Repair and maintenance of boats and marine engines for the general public December 21, 1979.

Sec. 775.4 Traditional functions of States and their political subdivisions.

(a) In the National League decision, it was made clear that schools and hospitals, fire prevention, police protection, sanitation, public health, and parks and recreation are traditional functions or activities of States and their political subdivisions.

(b) In addition, the Administrator has determined that the following functions of a State or its political subdivisions are traditional (From time to time, this section will be amended to list other such functions determined to be traditional).

(1) Libraries.

(2) Museums.

ATTACHMENT II

Financial Impact
of
Garcia Decision

Impact Statement----Fair Labor Standards Act

Prepared By
The National Public Employer Labor Relations Association

<u>Jurisdiction</u>	<u>Population</u>	<u>Cost</u>	<u>Comments</u>
Memphis, TN	645000	\$536000	Just for overtime costs.
Tukwila, WA	5000	55000	Most of this amt. is in fire service.
State of Iowa	--	--	Increase in overtime costs of 50%, plus giving unions unfair advantage.
Snohomish, WA	--	4000	County fire protection dist.
Reokuk, IA	13500	80000+	Tax rate at max already. Need time to negotiate with unions.
Palm Springs, CA	32000	178000+	Just in fire department.
Aberdeen, WA			Letter only.
Pinellas Park FL	33000	35000+	Concerns re travel time, training.
St. Cloud, FL	8000	30000	Fire impact greatest. Need time to budget.
Glenview, IL	31000	--	Need more flexibility.
Cleveland, OH	558000	42000000	Just fire and police.
Bloomington, IL	1300	--	Employees do not want to loose comp time.
Sioux City, IA	82000	200000	Just in fire service.
Midwest City, OK	49000	--	Letter only.
Tamarac, FL	29000	--	"Serious financial impact."
Galveston, TX	61000	--	Need flexibility.
Sun Prairie, WI	13000	--	Five percent increase in personnel costs.

Bolingbrook, IL	37000	--	Letter only.
Charlotte, NC	323000	500000	Need flexibility.
Xenia, OH	2500	72000	This amounts to an 11% pay hike for no additional work.
Fort Dodge, IA	29000	40000	Already have enough economic problems.
Hollywood, FL	122000	858000	
West Palm Bch FL	62000	200000	Comp time.
Eugene, OR	103000	500000	
Mesa, AZ	171000	500000	
Council Bluffs, IA	56000	75000	Just fire and police.
Newport Bch, CA	63000	725000	? out of sync
Portsmouth, OH	26000	--	"Devastating."
Coeur d'Alene, ID	20000	10000	Fire service.
Salem, OR	89000	100000	Just in fire service.
Wheeling, IL	23000	--	Letter only.
Palatine, IL	32000	122000	
Davenport, IA	103000	200000	"will have to reduce service or personnel."
Edmond, OK	35000	500000	? sync
St. Louis, MO	437000	--	change all systems, compensation practices, etc.
Phoenix, AZ	824000	7.7M	Police 6.2M of this. (Confidential)

	Lisle, IL	16000	50000+	
	Des Plaines, IL	53000	250000	
	Dayton, OH	188000	--	letter only
	San Diego Cnty, CA	--	--	letters to congressional del.
41				
	Baltimore, MD	780000	7M	Per phone conversation with JA
	Lawton, OK	80000	1M	
	Chambersburg, PA	<30000	--	Letter only.
	Woodridge, IL	<30000	85000	Police, comp time big problem.
	Royal Palm Bch, FL	<3000	20%	Fire and Police.
	Upper Arlington, OH	35000	365000	Cost is 3x current federal aid, sleep time excluded, phase in.
47				
	Naples, FL	<30000	30000	This cost is for fire department alone. Increased paper work and lower morale.
	Lynnwood, CA	48000	--	No estimate provided.
49				
	Sheboygan, WI	48000	232000	Comp time pay out plus 1.5 hrs. ot per firefighter per week.
	Kern County, CA	--	--	Letter only, but cited court case, Skyline Homes vs. Dep't of Industrial Relations, which will increase costs even more.
	Miami, FL	383000	1.3M	
	Pasadena, CA	121000	400000	
	Westminster, CO	50000	160000	fire service hardest hit, impact on flexible work hours

55	Savannah, GA	145000	196000	Delay to 1986.
	Glendale, CA	142000	.3M-.5M	
	Richfield, MN	37000	--	Employees on flex-time a concern.
	La Grange, IL	<30000	24000	Fire alone.
58	Lima, OH	47000	67200	Police, fire, util, public works affected.
	Madison County NY			Services will be restricted.
	Courtland County NY			Hiway dept, fire, sheriff, social services. Funds not readily available.
	Dade County FL			Letter only.
	Faribault, MN	<30000	128000	Fire greatly affected.
	Broome County, NY		75-250k	Most affected will be transit.
	Las Vegas, NV	179000	considerable	
	Kansas City, KS	162000	6M	Fire only.
	San Diego CA	915,956	\$6,800,000	Significant increase in Budget Will create serious disruption in labor relations program.
	Northbrook, IL	30000	\$200000	fire, emer serv., water, police public works
66	Dade City, FL	<30000	\$100000	A 5% payroll increase.
	Santa Maria, CA	39000	min \$10000	Fire and sanitation hit hardest
	San Bernardino, CA	124000	min \$400000	

Pompano Beach, FL	52000	not provided	Letter only.
Reading, PA	78000	\$149000	A .5 mill property tax hike will be needed.
Watertown, SD	15000	\$100000	Will have to curtail police and fire service.
74 St. Louis Prk, MN	42931	\$90000	Police and Fire cited.
Fond du Lac, WI	35863	\$119000	No increase in productivity. Official resolution passed.
Durango, CO	<30000	\$21000	
Warwick, RI	87000	Substantial	
Denver, CO	505000	\$1.85M	Annual cost.

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Senator NICKLES. Thank you very much, Mr. Forbes. I appreciate your consolidating your statement.

Mr. Hern.

Mr. HERN. Thank you, Mr. Chairman, members of the committee. My name is Herbert R. Hern, and I'm president of the Industrial Employers and Distributors Association, headquartered in the San Francisco Bay area.

Industrial Employers and Distributors Association was incorporated in 1936 as a California nonprofit corporation for the purpose of representing employers for collective bargaining and industrial relations purposes.

Today, we represent some 198 private sector employers and 43 public jurisdictions, employing in excess of 44,000 employees. The public jurisdictions we represent include counties, cities and special districts in northern California. A listing of these jurisdictions is included in my formal statement which was distributed to you earlier.

I might also add that I suspect that I am probably the only panel member you heard today who actively sits at the bargaining table with most of the public employee unions, at least those that are operating in northern California, and deal with the business agents and the rank and file employees on committees.

All of these jurisdictions that I represent are justifiably alarmed over the impact of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*.

At the outset, let me make it clear that, to my knowledge, none of the public jurisdictions represented by us objects to the minimum wage except for volunteer firefighters, or to the child labor provisions of the act. We know of no public jurisdiction that does not fully comply with those provisions. Our sole concern is with the overtime provisions of the act, and it is to discuss the problems arising therefrom that I will be addressing here today.

The major points I wish to make to the committee are: First, no worthwhile public interest is served by extending the provisions of the Fair Labor Standards Act to public jurisdictions.

Second, considerable harm has been, and will be done to the public employers as a result of subjecting them to compliance with the Fair Labor Standards Act. Third, with the possible exception of firefighters, little, if any, benefit will accrue to public sector employees as a result of the Supreme Court's decision.

Most public sector employees feel coverage under the Fair Labor Standards Act is a takeaway, imposed on them by the Federal Government.

Indeed, if the unions have a desire to reflect the grassroots sentiments of their members, they will tell you of this concern. And, fourth, the elimination of a public employee's ability to build up a bank of comp time will cause localities to eliminate manpower since they will no longer have to overman to account for such comp time.

From a long-term viewpoint, this should be of concern to unions which desire to preserve jobs.

Another adverse effect of the act occurs over the virtual elimination of the ability to reimburse employees with compensatory time off in lieu of cash for overtime worked.

This may come as a surprise to some, including the labor speakers who preceded me, but a large proportion of public employees prefer compensatory time off to cash. Virtually every public sector union with whom we deal has demanded in negotiations the right to receive compensatory time off in lieu of cash payments.

More ominously, since the impact of the Supreme Court decision has sunk in, individual employees have advised their supervisors that they will no longer make themselves available for overtime work, including emergency situations, if they must accept overtime pay instead of compensatory time off.

Another problem in California, at least, police sergeants and detectives are included in virtually all police officer bargaining units, and fire captains are included in virtually all firefighter bargaining units. It is generally agreed that in most larger jurisdictions, police sergeants and detectives and fire captains are exempt from the provisions of the Fair Labor Standards Act.

This creates a potentially explosive situation whereby 30 to 40 percent of the firefighters, and 10 to 30 percent of the policemen, working under collective-bargaining agreements may, by reason of being exempt from the act, continue to enjoy compensatory time off while the remainder of the bargaining unit will lose the same privilege. This poses significant difficulties in a collective-bargaining environment.

In the city of Hayward, CA, a group of firefighters have filed a class action in the U.S. district court for, as yet, unspecified overtime pay, liquidated damages, attorneys' fees and costs, and injunctive relief under section 16(b).

The firefighters allege that the city is liable for overtime pay for the 2-year period prior to the commencement of the action on March 22, 1985. While the sum is yet unspecified, it is believed that the firefighters are seeking overtime compensation for all hours worked in excess of 40 hours per week which in the case of the Hayward firefighters was a 56-hour workweek, negotiated and agreed to between the city and the firefighters' union.

Incidentally, each of the plaintiffs named in this case is a member of the union's negotiation committee. Other cases seeking the same claims for relief have been filed by fire fighters employed by the California cities of San Bruno, Milpitas, Vallejo, and San Mateo.

While it would be inappropriate for me to discuss the merits of these actions pending litigation, it appears that the Supreme Court's decision in *Garcia* and the actions of the Department of Labor, with regard to enforcement, have left these jurisdictions and all public jurisdictions ripe for mass litigation from all groups of employees, for retroactive pay claims for periods when public jurisdictions were quite properly operating in good faith under the Supreme Court's prior decision in *National League of Cities*.

In conclusion, it appears that the application of the Fair Labor Standards Act to public employees does not satisfy any legitimate public interest. Further, application of the act will result in significant and irreparable harm to public jurisdictions and the citizenry, in general, without benefiting public sector employees.

We urge this committee and the Congress to repeal the Fair Labor Standards Amendment of 1974 and specifically that portion of the amendment extending the act's overtime provisions to public sector employers.

Recognizing that the subcommittee may have additional hearings in September, I would respectfully request the opportunity to submit further written comments for the record at that time.

Thank you for your attention. This concludes my statement and I will be happy to answer any questions that the Committee may have.

[The prepared statement of Mr. Hern follows:]

STATEMENT OF HERBERT R. HERN
PRESIDENT, INDUSTRIAL EMPLOYERS AND DISTRIBUTORS ASSOCIATION
BEFORE THE
SENATE LABOR COMMITTEE

July 25, 1985

Mr. Chairman and Members of the Committee:

My name is Herbert R. Hern and I am the President of Industrial Employers and Distributors Association headquartered in the San Francisco Bay Area. The Industrial Employers and Distributors Association was incorporated in 1936 as a California nonprofit Corporation for the purpose of representing employers for collective bargaining and industrial relations purposes. Today we represent some 198 private sector employers and 43 public jurisdictions employing in excess of 44,000 employees. The public jurisdictions we represent include counties, cities and special districts in Northern California. A listing of these jurisdictions follows:

City of Alameda	Contra Costa Mosquito Abatement District
City of Albany	Dublin San Ramon Services District
City of Antioch	Half Moon Bay Fire Protection District
City of Belmont	Hayward Area Recreation and Park District
City of Benicia	Housing Authority of the City of Alameda
City of Concord	Housing Authority of the County of Contra Costa
City of Hayward	Marin Municipal Water District
City of Larkspur	Marin/Sonoma Mosquito Abatement District
City of Mill Valley	Menlo Park Fire Protection District
City of Pacifica	North San Mateo County Sanitation District
City of Piedmont	Oro Loma Sanitary District
City of San Carlos	Port of Redwood City
City of San Leandro	Ross Valley Paramedic Authority
City of San Rafael	Sacramento-Yolo Port District
City of Sausalito	San Mateo County Harbor District
Town of Corte Madera	San Ramon Valley Fire Protection District
County of Alameda	South Bayside System Authority
County of Contra Costa	South County Fire Protection District
County of San Mateo	Tamalpais Fire Protection District
Alameda Bureau of Electricity	Twin Cities Police Authority
Association of Bay Area Governments	Union Sanitary District
Central Marin Sanitation Agency	

Employees in these public jurisdictions are represented by some 80 unions and employee organizations.

All of these jurisdictions are justifiably alarmed over the impact of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority which made them subject to the Fair Labor Standards Act enacted by the Congress in 1938.

At the outset let me make it clear that to my knowledge none of the public jurisdictions represented by the Association objects to the minimum wage (except for volunteer firefighters) or to the child labor provisions of the Act. We know of no public jurisdiction that does not fully comply with those portions. Our sole concern is with the overtime provisions of the Act and it is the problems arising therefrom that I am addressing here today.

The three major points I wish to make to the Committee and which I will elaborate on in this statement are:

- 1) No worthwhile public interest is served by extending the provisions of the Fair Labor Standards Act to public jurisdictions.
- 2) Considerable harm has been, and will be, done to public employers as a result of subjecting them to compliance with the Fair Labor Standards Act.
- 3) With the possible exception of firefighters, little, if any, benefit will accrue to public sector employees as a result of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority.

These observations lead to but one conclusion, Congress should repeal the Fair Labor Standards Amendments of 1966 and 1974 which extended coverage under the Fair Labor Standards Act to public sector employers.

In 1938 when the Congress enacted the Fair Labor Standards Act the Nation was still in the grips of the "Great Depression" and its attendant high unemployment levels. The Congress intended the overtime provisions of the Act as a penalty for those employers who worked employees in excess of forty hours per week and to induce employers to hire additional workers, thereby reducing unemployment. These were

not compelling reasons when the Congress extended the Fair Labor Standards Act to public jurisdictions in 1966 and again in 1974. Frankly, I know of no valid public purpose for the 1974 legislation (other than perhaps political). In view of the major economic, administrative and morale problems engendered by that legislation, I would respectfully request the Congress to reexamine its motives in passing the 1974 Amendments, and if the Congress concurs with my conclusion that little, if any, benefit has accrued to the covered public workers, to rescind that legislation.

Let us examine first the original intent of the Congress in 1938 which was to increase employment. In 1938 fringe benefits for workers was virtually unheard of and the cost to the employer of the few that did exist were minimal. A 50% increased overtime cost was indeed a significant penalty, therefore employers were motivated to hire additional employees, thereby improving employment opportunities. Today fringe benefits cost from 25% to 50% of base pay, thus making it more cost effective to work employees overtime when necessary rather than going to the expense of hiring and training new employees. The overtime provisions of the FLSA have not been an inducement to hire additional employees for several decades.

Public employees do not benefit from coverage under the FLSA. Virtually all of the public sector unions as well as individual employees with whom I have spoken believe the Act has hurt them in several major areas while providing some benefit for only one class of employees--firefighters. Even they, for the most part, are unhappy over the negative impact of the Act.

There are significant damaging effects of subjecting public employees to the overtime provisions of the FLSA. You have heard, and will hear, from many distinguished public officials during the course of these hearings. They are far more qualified than I to discuss the economic impact of the Act on them. So as not to be redundant, suffice it to say that significant additional costs will be imposed on virtually every public employer. Most of this will be paid to police and fire employees for overtime hours worked for which they can no longer substitute compensatory time off.

In addition to these direct labor costs, significant administrative costs will also result. Every public jurisdiction with which I am familiar already

provides overtime for all hours worked or paid for in excess of forty hours per week (except fire suppression personnel) and for all hours worked or paid for outside of the regularly scheduled workday (five eight-hour days or four ten-hour days per week). But the Fair Labor Standards Act only requires overtime pay for hours actually worked (as opposed to time not worked but paid for such as sick leave, vacation days, etc.) in excess of forty hours per week for employees not subject to Section 7 (k) of the FLSA. This would not be a problem except that the base wage rate upon which the overtime rate is based differs between most public sector labor agreements and the Act. For example, some public sector employers provide longevity pay for long service employees, educational bonuses for advanced courses, etc. These premiums, which are rarely found in the private sector because those employers have been subject to the FLSA since 1938, abound in the public sector. Such incentives or bonuses must be included in the base wage rate for overtime calculations under the FLSA but not under the typical public sector labor contract. Consequently, we have advised our public sector employers to keep two sets of overtime records--one to calculate overtime pay each work period under the provisions of the FLSA and the other calculated in accordance with the provisions of the labor contract. They are then advised to pay overtime under whichever standard produces the higher total overtime payment. This record-keeping requirement is particularly aggravated when dealing with police and fire personnel for whom the Section 7 (k) exemption is claimed.

Another adverse effect of the Act in the public sector occurs over the virtual curtailment of the ability to reimburse employees with compensatory time in lieu of cash for overtime work performed. This may come as a surprise to some, but a large portion of public employees prefer compensatory time to cash. Virtually every public sector union with whom we deal has demanded in prior negotiations the right to receive compensatory time off in lieu of cash payments. More ominously, since the impact of the Supreme Court decision has sunk in, employees have advised their supervisors that they will no longer make themselves available for overtime work (including emergencies) if they must accept overtime pay instead of compensatory time off.

The impact of the FLSA on volunteer firefighters will also be substantial and may very well eliminate this vital public service.

Public sector employers retain additional employees so as to have an adequate work force available in view of their obligation to permit workers to be off duty on accumulated compensatory time off. The very existence of compensatory time serves to increase employment levels in public jurisdictions. Ironically, the FLSA will end a practice which produces additional employment--one of the original objectives of the overtime provisions.

Given the negative impact of the application of the FLSA to public sector employers and on employment levels, there are no pluses for the employees themselves. In order to explore this area further it is necessary to discuss the effect on three categories of public employees: those subject to the forty hour provisions of the Act, police personnel and fire personnel.

The first category, those subject to the basic provisions of the Act include blue collar, clerical and technical employees such as engineers. Generally, those who are working under the terms of a labor contract (presumably the vast majority) already have more beneficial overtime provisions than those provided under the FLSA. To my knowledge, all of these employees receive time and one-half overtime pay or an equivalent amount of compensatory time off for all time worked or paid for in excess of eight hours per day (or in excess of ten hours per day if they are scheduled to work four ten-hour days) as well as for time worked in excess of forty hours per week. Under FLSA requirements they receive time and one-half only for time actually worked in excess of forty hours per week. Thus, under the terms of a standard labor agreement, an employee who works ten hours on Monday, ten hours on Tuesday and ten hours on Wednesday and then takes vacation (or is ill or otherwise absent) on Thursday and Friday, will nevertheless, be compensated in pay or accumulated time off for six hours that week at their overtime rate of time and one-half. Under the same conditions that employee would not be entitled to any overtime compensation under the terms of the FLSA because he or she did not actually work in excess of forty hours that week. These employees stand to gain nothing and to lose their cherished right to receive accumulated compensatory time off in place of cash for overtime work.

The impact of the FLSA on police officers will be similar to that described above for blue collar, clerical and technical employees, although on occasion their

overtime rate may be somewhat higher when their overtime calculated under the provisions of the FLSA exceeds their overtime as calculated under the terms of their labor agreement. We estimate this to be a miniscule amount. They essentially work a forty hour workweek, and because of their eligibility for the Section 7 (k) exclusion, they will be in the same position as the other forty hour employees--that is, with undesired additional compensation and loss of compensatory time.

Firefighters stand to gain the most through an administrative quirk in the regulations adopted by the Wage and Hour Division of the Labor Department: The established workweek for most firefighters employed by California cities and counties (excluding those employed by the State of California and the Federal Government) is an average "on duty" schedule of fifty-six hours. (Federal and State firefighters work different schedules.) West Coast firefighters are typically on duty for ten shifts of twenty-four hours duration each during a thirty calendar day period. During each twenty-four hour duty tour firefighters are scheduled to work eight hours and are only required to respond to emergency calls during the remaining sixteen hours. They are paid, however, for the entire twenty-four hour duty tour. The fifty-six hour average workweek was a cherished goal of firefighters for years, and in their view is equal to, and preferable to, the forty hour workweek applicable to most workers. If you have any doubt about this observation, talk to any Fire Department Chief about the difficulty involved in inducing fire suppression personnel (56 hour average workweek) to work a forty hour workweek.

Unfortunately the Wage and Hour Division, in order to come up with a standard for firefighters, and unable to reconcile different scheduling practices in effect in other parts of the country--calculated an average. The average came out to 53 hours. As a result West Coast firefighters who had been very happy with their fifty six-hour average workweek obtained a windfall. Assuming they work each regularly scheduled shift (remember the FLSA counts only actual hours worked for overtime purposes) they will automatically receive an additional 1-1/2 hours pay per week--the equivalent of a 2.7% pay raise--for no additional work. But they also lose--they lose their cherished compensatory time and now have to accept certain limitations on other privileges such as shift trades.

Finally, there are several other areas of potential loss to public employees. They include the loss of additional employment opportunities when they serve as guards at school dances, shopping malls, etc. On balance it is safe to conclude that, with the exception of firefighters, very few, if any, public employees have benefited from coverage under the FLSA.

There is one other disturbing consequence resulting from the Supreme Court decision--one that directly impacts on the collective bargaining relationship between the parties--at least in California. When Congress first enacted the National Labor Relations Act and the Fair Labor Standards Act, both were applicable to the same general classes of employees. For example, the NLRA excluded supervisors and the FLSA exempted supervisors. Accordingly, both the right to join Unions and the overtime provisions of the FLSA applied to the same categories of employees and were compatible. California legislation extending collective bargaining rights to public employees does not exclude supervisors. As a result, police sergeants and detectives are included in virtually all police officer bargaining units and fire captains are included in virtually all firefighter bargaining units. Many experts in the administration of the FLSA agree that police sergeants and detectives, fire captains, and certain supervisors are exempt from the provisions of the FLSA. This creates a potentially explosive situation whereby thirty to forty percent of the firefighters and ten to thirty percent of the policemen working under collective bargaining agreements may, by reason of being exempt from the strictures of the Act, continue to enjoy compensatory time off for overtime work while the remainder of the bargaining unit will lose a substantial amount of the same privilege. Similarly, some will receive overtime pay under FLSA regulation while others will not, although they work side by side on the same shift for the same hours. This poses significant difficulties in a collective bargaining environment, as well as, in organizational relationships and administration. Police and fire unions in particular will have a membership divided as to the importance of various issues. The police sergeants and detectives and fire captains as can be expected to press for such items as longevity pay and educational incentive pay, whereas public jurisdiction employers will stiffen their resistance to this type of demand because of their escalator effect in FLSA overtime compensation. Younger, non-exempt police and fire personnel will be more interested in pressing for additional paid time off, i.e., vacations, personal leave days, etc. to compensate

for the loss of compensatory time off and to press for restrictions on the requirement to perform overtime work. All in all not a pleasant prospect for harmonious labor relations in the public sector.

In the City of Hayward, a group of firefighters has filed a class action in the United States District Court for the Northern District of California for as yet unspecified overtime pay, liquidated damages, attorneys' fees and costs, and injunctive relief under Section 16 (b) of the Fair Labor Standards Act pursuant to the Garcia decision. In the action, the firefighters allege that the City is liable for overtime pay for two the year period prior to the commencement of the action on March 22, 1985. While the sum is yet unspecified, it is believed that the firefighters are seeking overtime compensation for all hours worked in excess of forty hours per week, which in the case of the Hayward firefighters was a fifty-six hour workweek negotiated and agreed to between the City of Hayward and the Firefighter's Union. Incidentally each of the plaintiffs in this case are members of the Union's negotiating committee. Although the judge assigned to this matter has ruled that the cases are not related, other cases seeking the same claims for relief have been filed by firefighters in the following San Francisco Bay Area jurisdictions: City of San Bruno, City of Milpitas, City of Vallejo, and the City of San Mateo. The firefighters in each of these jurisdictions have one thing in common with the City of Hayward--their union retains the same legal firm.

While it would be inappropriate for me to discuss the merits of these actions pending litigation, it appears that the United States Supreme Court's decision in Garcia and the actions of the Department of Labor with regards to enforcement have left these jurisdictions and all public jurisdictions ripe for mass litigation from all groups of employees for retroactive pay claims for periods when public jurisdictions were quite properly operating in good faith under the Supreme Court's decision in National League of Cities v. Usery. The parties in the Hayward case are currently in the discovery process of litigation and are scheduled to return to federal court in November.

In conclusion it appears that the application of the Fair Labor Standards Act to public employees does not satisfy any legitimate public interest. Further,

application of the Act will result in significant irreparable harm to public jurisdictions and the citizenry in general whose tax dollars fund the services provided by the public jurisdictions without benefiting public sector employees. Rather, it does significant harm to the public sector employer and employee alike. We urge this Committee and the Congress to repeal the Fair Labor Standards Amendments of 1966 and 1974, and specifically that portion of the Amendments extending the Act's overtime provisions to public sector employees.

Thank you for your attention. This concludes my statement. I will be happy to answer any questions the Committee may have.

Senator NICKLES. Thank you very much, and thanks to all of our panelists.

I will ask a quick question, and any of you can answer, on what the employees desire, comp versus straight time pay. Many of you have been in the negotiating process, or monitored, or worked with the negotiators; the one big debate that we hear is what do the employees want.

The *Garcia* decision basically mandates that it has to be overtime pay instead of comp pay. Comp pay is what you have heard from other people is very prevalent. How prevalent is it, and is there a real strong desire from the employees—do they like having the option, or should the Federal Government not dictate that it be strictly the overtime pay as the only option?

Mr. AIONA. Senator, I can speak from my own experience. I spent 18½ years on the line. Prior to 1959, we had a 6-day work-week, 7 days off. We had comp time at that time; what we did was build up our comp time, so we could add on an additional day for time off. With the advent of this 2-day-off period, most of the men, and I can recall myself included, would rather have comp time off.

I notice that the firemen in my jurisdiction, as well as police officers, all like to have comp time off. And that's the feeling that I have from my jurisdiction, as well as from the city and county of Honolulu and others.

Mr. HANKLA. Senator, within the collective-bargaining environment, the ability to move in the direction of comp time frequently enables a local jurisdiction to grant more in terms of the salaries. And so within the overall context of collective bargaining, to me, that's a reasonable give-and-take process and one that the employee organizations, as well as management, participates in.

Frequently, that option, when you have limited resources, a cap on your resources, is one that really does provide a better opportunity for higher salaries for the employees.

Senator NICKLES. You mentioned that you worked with a large number of employee organizations. Is compensatory time fairly prevalent?

Mr. HANKLA. Absolutely.

Senator NICKLES. Half the contracts or—

Mr. HANKLA. I would say that all of them provide for it in one form or another.

Senator NICKLES. Ms. MacIlwaine.

Ms. MACILWAINE. Yes. Our county has 600,000 people, and we employ 3,500 in our county government, and I would say every time we've negotiated the contract for the past 15 years, compensatory time has been requested by our employees, especially women in our government who feel they need to build up some extra time to spend with their families, either on vacation or with their children, to school plays, or whatever, that they just can't take under normal circumstances.

Senator NICKLES. Does it help you, as well, as far as management and being able to plan fiscally throughout the year? You mentioned the fires in California, or maybe the drug cases in Florida, that may have certain spurts on it. I don't know how you would have the flexibility or the ability to really budget and see what you would be paying this month for the fires, or a particular month in drug cases.

Mr. FORBES. I think that is very true, Senator. I think the flexibility that the comp time provision has, both for the employer and the employee, is one of the compelling arguments for providing that choice.

Mr. HERN. I would just like to echo, Mr. Chairman, that in the 43 jurisdictions where we're present, the demand for comp time comes from the employees. The employer frequently has to try to attempt to limit the comp time.

Senator NICKLES. I apologize to our last panel for the fact that I needed to move fairly quickly.

Also, for the record, I want to add statements from Mayor Tom Bradley, the National Association of Towns and Townships, and from Mayor Ed Koch from New York. I would like to include in the record, a letter to me, signed by leaders of several organizations, summarizing their desire for legislation.

[The statements and letter referred to follow:]

STATEMENT OF MAYOR TOM BRADLEY

TO THE

SENATE LABOR SUBCOMMITTEE

JULY 25, 1985

AS MAYOR OF THE CITY OF LOS ANGELES, I WISH TO STRESS THE URGENT NEED FOR CONGRESSIONAL RELIEF FROM THE IMMEDIATE IMPACT OF THE FAIR LABOR STANDARDS ACT ON STATE AND LOCAL GOVERNMENTS ACROSS THE UNITED STATES.

ON FEBRUARY 19TH OF THIS YEAR, WITHOUT ANY WARNING WHATSOEVER, THE SUPREME COURT HANDED DOWN ITS DECISION IN THE GARCIA CASE AND THUS IMPOSED A POTENTIAL \$3 BILLION PER YEAR LIABILITY ON STATE AND LOCAL GOVERNMENTS THROUGHOUT THE NATION. IN MY CITY ALONE, WE ESTIMATE ANNUAL COSTS COULD RUN AS HIGH AS \$100 MILLION. WE DON'T HAVE THAT KIND OF MONEY, NOR EVEN A SMALL PART OF IT.

BECAUSE OF A SERIES OF SIMULTANEOUS PROBLEMS INCLUDING FEDERAL CUTBACKS AND SERIOUS ECONOMIC DOWNTURNS, MY CITY SINCE 1979 HAS HAD ITS MOST SIGNIFICANT BUDGETARY REDUCTIONS SINCE THE GREAT DEPRESSION. SOME 6,000 OF OUR 32,000 GENERAL CITY STAFF WERE CUT OUT. BASIC EQUIPMENT AND OTHER CAPITAL ACCOUNTS WERE IN MANY CASES ELIMINATED. WITH THE HELP OF THE RECENT BETTER ECONOMY, A FEW MODEST RESTORATIONS HAVE BEEN MADE OVER THE LAST 18 MONTHS. HOWEVER, A MAJOR BLOW TO OUR EFFORTS HAS ALREADY OCCURRED WHEN WE LEARNED EARLIER THIS YEAR OF THE PROJECTED WITHDRAWAL OF FEDERAL REVENUE SHARING

FUNDS. THAT IS AN OVER \$50 MILLION LOSS TO THE CITY OF LOS ANGELES, OR THE EQUIVALENT OF ABOUT ONE-THIRD OF OUR FIRE DEPARTMENT. SOMEHOW, WE WILL HAVE TO OVERCOME THAT LOSS. THE GARCIA DECISION TRULY PUTS US IN A CRISIS SITUATION BY ADDING ANOTHER \$100 MILLION TO OUR PROBLEMS.

THE GREATEST IMPACT OF FLSA IS IN OUR POLICE, FIRE AND PARAMEDIC SERVICES. OVER THE YEARS WE HAVE BEEN ABLE TO SAVE MILLIONS OF TAXPAYER DOLLARS BY ENCOURAGING FIREFIGHTERS TO VOLUNTEER FOR EXTRA DUTY AT STRAIGHT TIME RATES. IN THIS WAY WE HAVE REDUCED OUR NEED FOR ADDITIONAL PERSONNEL WITH ATTENDANT PENSION COSTS. THE RESULT HAS BEEN LOWER FIRE PROTECTION COSTS AND FIREFIGHTERS WHO ARE EXTREMELY HAPPY WITH THE PRESENT SCHEDULING ARRANGEMENTS AND HIGHER PERSONAL INCOME. IF NOT MODIFIED, FLSA WILL ELIMINATE OUR ABILITY TO CONTINUE PRESENT PRACTICES.

IN THE CASE OF POLICE SERVICES, IT APPEARS THAT A WIDE VARIETY OF ACTIVITIES MAY NOW BE COMPENSABLE WHEN IN THE PAST THEY HAVE BEEN AN ACCESSORY PART OF AN OFFICER'S DUTY. FOR EXAMPLE, IT SEEMS THAT UNDER CERTAIN CIRCUMSTANCES AN OFFICER'S MEAL TIME MUST NOW BE PAID. WE COULD FIND OURSELVES IN THE RIDICULOUS SITUATION OF PAYING A POLICE OFFICER \$20 TO EAT A \$2 LUNCH. HERETOFORE, A POLICE OFFICER, LIKE ALL OTHER EMPLOYEES, ATE MEALS ON HIS OR HER OWN TIME AT MID-SHIFT. AN ALTERNATIVE TO PAYING OFFICERS EXTRA TO EAT LUNCH MAY BE TO SHORTEN THEIR DUTY TOURS, THUS REDUCING THEIR TIME ON THE STREET BY 10 PERCENT. A SIGNIFICANT LOSS IN CITIZEN PROTECTION THUS RESULTS.

MANY OTHER COSTLY CIRCUMSTANCES ALSO EXIST. BUT I WILL NOT GO INTO THAT LEVEL OF DETAIL AT THIS TIME. INSTEAD, I WOULD LIKE TO UNDERScore

THE REQUEST OUR COUNCIL PRESIDENT PAT RUSSELL MADE ON JUNE 25 AND TO SUPPORT THE REQUESTS BEING MADE BY OTHER LOCAL AND STATE GOVERNMENTS AND THE NATIONAL LEAGUE OF CITIES.

I FIRMLY BELIEVE, AND URGE CONGRESS IN THE STRONGEST POSSIBLE TERMS TO ENACT A MORATORIUM ON THE OPERATION OF THE ACT SO THAT CONGRESS CAN DETERMINE FOR ITSELF WHAT NEEDS TO BE DONE. YOU NEED TO HEAR FROM CITIES, COUNTIES, SCHOOL DISTRICTS, STATES AND OTHER GOVERNMENTAL AGENCIES AS TO THE FINANCIAL BURDENS THE GARCIA DECISION HAS IMPOSED. YOU NEED TO HEAR ALSO FROM THE AFFECTED EMPLOYEES AND THE TAXPAYERS WHO WILL PAY THE BILL. YOU NEED TO ALSO CONSIDER THE DEEPER QUESTIONS OF FEDERAL CONTROL AND INTERVENTION IN THE AFFAIRS OF STATE AND LOCAL GOVERNMENTS. CONGRESS ALSO NEEDS TO ENACT A SUSPENSION OF ANY RETROACTIVE LIABILITY.

I BELIEVE THAT IF YOU GIVE THESE ISSUES DUE CONSIDERATION, YOU WILL CONCLUDE BY GRANTING PERMANENT RELIEF FROM THE OVERTIME PROVISIONS OF THE ACT FOR ALL STATE AND LOCAL GOVERNMENT EMPLOYEES. FOR EXAMPLE, CONSIDER THE DISASTEROUS FIRES WHICH HAVE SWEEPED UP AND DOWN CALIFORNIA DURING THE PAST FEW WEEKS. EVERY FIREFIGHTING AGENCY HAS BEEN PUSHED TO THE LIMIT, PHYSICALLY AND FINANCIALLY. FLSA WILL COMPOUND OUR PROBLEMS IN PAYING FOR THAT KIND OF ESSENTIAL PROTECTION. AS ANOTHER EXAMPLE, CONSIDER THE PURSUIT OF CRIMINALS BY OUR POLICE FORCES. CRIME DOES NOT WATCH A TIME CLOCK. CRIMINALS DON'T PUNCH IN AND OUT TO CONVENIENTLY COINCIDE WITH POLICE WATCH SCHEDULES. MANY OTHER EXAMPLES EXIST WHICH FLSA NEGATIVELY IMPACTS. FLSA THREATENS THE CONTINUATION OF MANY VITAL SERVICES.

IN THE MEANTIME, A TIME BOMB IS TICKING IN EVERY CITY HALL AND STATE HOUSE IN THIS COUNTRY. I THEREFORE URGE YOU TO:

- GRANT A CONGRESSIONAL MORATORIUM ON IMPLEMENTATION OF FLSA PENDING MORE IN-DEPTH STUDY.
- ELIMINATE THE RETROACTIVE FINANCIAL PROBLEMS.
- EXEMPT STATE AND LOCAL GOVERNMENT FROM THE OVERTIME PROVISIONS OF FLSA.

THANK YOU.

Senate Labor and Human Resources Subcommittee on Labor

Hearing on the Fair Labor Standards Act

July 25, 1985

I wish to thank you for inviting me to testify before your subcommittee. Unfortunately, scheduling difficulties prevent me from appearing today. I applaud you for providing a forum where the views of state and local government officials may be heard on this critical and significant public policy issue.

The imbalance in our federal system created by the Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority* will have a deleterious and burdensome impact on the already stretched budgets of local governments and unnecessarily hinders their ability to deliver vital public services. A preliminary survey reveals that the cost to New York City will be a minimum of \$40 million per year.

The issue does not involve the application of the minimum wage, non-payment of overtime, or long uncompensated work weeks. The issue involves a Supreme Court decision about which even local government employees are not ecstatic. Overtime controls will necessarily erode collectively bargained benefits and will in fact cut into their total wages and prevent them from receiving time off in lieu of cash compensation for overtime.

The Supreme Court's decision directed local governments to Congress for an exemption from FLSA. It is time for Congress to act to correct the imbalance and inequity which is unfair to local governments and their workers and, overnight, undoes years of collective bargaining arrangements that reflect longstanding local needs, and will necessarily result in a reduction of services or an increase in taxes.

Edward I. Koch
MAYOR
City of New York



National
Association of
Towns and Townships

STATEMENT

OF THE

NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS

SUBMITTED FOR THE RECORD

OF THE

SUBCOMMITTEE ON LABOR

OF THE

COMMITTEE ON LABOR AND HUMAN RESOURCES
U.S. SENATE

JULY 25, 1985

NATAT

The National Association of Towns and Townships is a non-profit membership organization offering public policy support, educational services, and technical assistance to over 13,000 local government officials from small governments across the U.S. NATAT's members are predominantly small governments representing 25,000 people or less, governed by trustees, mayors, selectmen, supervisors, and other elected or appointed officials.

NATAT's members are united in their belief that the nation's approximately 36,000 general purpose governments that serve 25,000 people or less are important institutions in the U.S. federal system and deserve to be recognized and treated as such. NATAT was created in 1976 to bring this message to the nation's capital and to the private sector.

FLSA--Another Blow to Federalism

The Supreme Court's February 19, 1985 decision in Garcia vs. San Antonio Metropolitan Transit Authority struck yet another blow to the constitutional balance among the federal, state, and local levels of government. In recent years, state and local governments have been besieged by federal initiatives to "get the federal government off the back of state and local governments" but such initiatives have backfired. Instead of being relieved from federal intrusion, state and local governments are finding themselves saddled with growing responsibilities mandated by the federal government but equipped with fewer and fewer resources to meet these responsibilities. For localities, in particular, the trend has been towards treating them as private institutions.

Local governments are encouraged to develop private sector solutions to growing public management problems. Because public sector responsibilities are so extensive, however, local governments and their officials are now liable well beyond public sector resources or the scope of private sector liability.

All three branches of the federal government are also moving to impose rigid standards of conduct on state and local governments. For example, the Supreme Court decided in Community Communications Co. vs. City of Boulder in 1982 that federal antitrust laws are applicable to governmental activities, and home rule provisions do not necessarily confer immunity. The U.S. Congress passed legislation last session which negated the Supreme Court's decision to a significant extent, but it took a major expenditure of local government resources to alter the court's decision. In the meantime, new federal mandates in other areas continue to be imposed at an alarming rate.

As a result, towns and townships are now liable for a wide range of activities including pollution liability, joint and several liability, and personal liability for government officials. This trend has sent town and township insurance costs skyrocketing and is making the purchase of insurance for some smaller governments out of the question or completely unavailable. The irony is that small governments, towns, and townships with part-time, unpaid elected officials and staffs of 1-10 people are being held liable on the same basis as multi-million dollar corporations acting in a private interest.

In another instance, the House Ways and Means Committee is contemplating mandatory Medicare coverage for state and local government employees in an effort to raise \$6 billion over three years. A rough estimate of the annual cost to state and local governments to provide such coverage is \$3 billion. This is but one of numerous fragmented efforts to erode local government immunity--from federal law and as with all other similar initiatives--without regard to the stature that local governments hold in the federal system. The federal government's efforts to reduce the deficit at the expense of state and local governments erodes the basic concept of state and local governments as providers of public service.

FLSA- Amendments Needed to Protect Government Functions

To help reverse federal initiatives that are undermining the importance of state and local government in the federal system, NATaT urges the Senate Subcommittee on Labor to move quickly to amend the Fair Labor Standards Act to protect the authority of state and local governments.

At a minimum, there are four major areas in the law that should be amended to take into consideration the unique problems of towns, townships, and small governments.

Volunteers

For all smaller local governments and in particular, rural governments, the volunteer work force sustains the government.

Small governments tend to have very few full-time and part-time employees but "employ" hundreds of volunteers. Here are but a very few of the ways in which volunteers help run rural and small governments:

- clean up roadways and parks
- manage community sales booth at local events
- run a grocery shopping service for seniors
- provide expert consulting services to elected officials (administrative, legal, etc.)
- fight fires and other disasters
- construct local park, recreation, and government facilities
- run summer youth programs
- manage community drug abuse hotlines
- lend special skills to preserve historical sites
- prepare meals and organize social activities for community centers

Unfortunately, it is far from clear in the Department of Labor's standards to what extent volunteer services would not be exempt from the law. The Department of Labor implies that individuals not employed by the townships and who volunteer services are exempt, while individuals "employed" by the township and who volunteer are not exempt. The Department of Labor does not state this distinction clearly, however, and even if it were stated clearly, it remains ambiguous as to the extent to which volunteers can or cannot be classified as "employees" of the

locality. For the vast majority of small and rural governments, making the distinction would be nearly impossible. Also an exhaustive classification system would have to be compiled for record keeping purposes--a task that could not be accomplished using the limited personnel available.

For these reasons, the National Association of Towns and Townships believes that all volunteers should be exempt from the Fair Labor Standards Act. Without the benefit of rules, regulations, and standards, most people are more than aware when they are "volunteering" time. Many people take great pride in volunteering their time and expertise to improve the community in which they live. Application of the FLSA to volunteer services would not only be difficult to accomplish, costly, and ineffective, it would demean volunteerism as a public spirited enterprise and curtail the number of people willing to volunteer. By eliminating the unique status of volunteers in the community, the FLSA undermines the sense of "giving of oneself" that characterizes a volunteer's commitment.

Overtime Provisions

Under the FLSA, regular employees are entitled to compensation on a time and a half basis for hours worked in excess of 40 hours per week. Overtime pay must also be paid to firefighters who work in excess of 212 hours on a 28 day period and to police officers who work in excess of 171 hours in a 28 day period.

This provision will have a severe impact on the employment practices of townships. Paid firefighters, supplemented by a

volunteer force, may not be employed on a "rotational" basis, part-time on, part-time off, under this standard. In addition, townships now regularly give time off in lieu of overtime because they may not have the funds to pay overtime and/or the accumulation of compensatory time is preferred by the police offices or firefighter. Under the FLSA, this practice would also have to be halted, because awarding compensatory time instead of overtime pay may not be acceptable.

The assumption behind this FLSA rule as well as other federal mandates seems to be that state and local governments have an unlimited source of funds. No where is this assumption more false than in towns, townships and rural governments. Given very limited resources, smaller governments have demonstrated great creativity in finding ways to provide public services--including use of volunteers, compensatory arrangements with employees, and involvement of private sector resources. Unfortunately the FLSA negates these efforts at time when townships need more creativity than ever to survive the possible elimination of federal programs and the growing demands being placed on townships under federal mandates.

Consequently, the overtime provisions of the FLSA should not apply to state and local government employees. NATaT also urges the subcommittee to consider language to accompany such a provision that includes a description of the reasons that towns, townships and small governments should be exempt from FLSA standards.

Prospective Application Date

NATaT asks the subcommittee to establish a prospective effective date for application of the FLSA to states and localities. The Department of Labor's current decision to impose liability on states and localities retroactive to April 15 will compound the problems described in this statement. The FLSA regulations establish countless new regulatory requirements for states and localities, many of which are being imposed in the middle of budget cycles and collective bargaining agreements.

In addition, time must be allocated to properly inform some 80,000 governments of the application of the FLSA to their employees and the consequences for their government. It takes time to translate, distribute, and explain standards to small, rural local governments whether neither staff nor expertise are readily available to interpret complicated requirements. Small governments must also find out about and order publications that explain the standards--a process that takes time for part-time elected officials beset with other responsibilities. NATaT urges the subcommittee to move legislation that takes such considerations into mind and establishes a prospective effective date for Department of Labor use. We ask the subcommittee to establish a moratorium on the application of the FLSA to states and localities that will ensure an orderly and harmonious transition period.

Exemption for 15 or Fewer Employees

NATaT believes that the following amendments should be made to FLSA at a minimum. However, more important than the amendments, NATaT urges the subcommittee to take this opportunity to acknowledge the impracticality of applying the FLSA to local governments with a total work force, full and part-time, of 15 or fewer employees. NATaT urges the subcommittee to exempt such local governments from the Act. Such an exemption would eliminate thousands of very small, predominantly rural governments, that do not have the resources to comply with the FLSA and that comprise a small percentage of the local government labor force.

Such an exemption is not unusual practice under other federal requirements. For example, the EEO-4 form required by the Equal Employment Opportunity Commission exempts all entities from the requirements if they have fewer than 15 full-time equivalent employees. Given the thousands of local governments that would have to be monitored for compliance with the FLSA if such an exemption did not exist, and the cost to the federal government (not to mention to localities) of maintaining compliance, such an exemption would seem to make good management sense.

In addition, while relieving thousands of small local governments from the burden of complying with the FLSA, an exemption would affect only a small percentage of the total local government labor force. For example, New York City's police force totals 26,000 officers. By contrast, it would be necessary to total all employees for thousands of small local governments

to reach this figure, yet each of those governments would still have to comply with the some procedures and would have to be monitored for compliance with the Act. Give the small percentage of the local labor force involved, NATaT believes a wiser and more realistic approach is to exempt such governments from all provisions of the FLSA and leave the management of their labor force to the discretion of the states. Such action would also permit state governments to address the peculiarities of local government that prevail from state to state according to law.

Conclusion

We thank the Chairman and members of the subcommittee for accepting this statement into the record. We believe that the changes proposed here for amending the FLSA are necessary to prevent undue interference with the operation of state and local government. We hope that the subcommittee will include them in legislation and approve the legislation as soon as possible, preferably before DOL enforcement activities begin on October 15, 1985.

July 22, 1985

Senator Don Nickles
Chairman
Senate Labor Subcommittee
SH-608 Hart Senate Office Building
Washington, DC 20510

Dear Senator Nickles:

We are writing to seek your support for legislation to mitigate the impact of the Supreme Court's February 19, 1985 decision in Garcia v. San Antonio Metropolitan Transit Authority on state and local government. In that decision, the Supreme Court overruled its 1976 National League of Cities v. Usery decision that the Tenth Amendment was a bar to application of the Fair Labor Standards Act (FLSA) to state and local employees engaged in traditional governmental functions, effectively extending the wage and hours provisions of the FLSA to states and localities.

We believe that, in at least three areas, amendments to the FLSA are necessary to accommodate the unique problems of state and local government.

First, individuals who provide service to state and local government on a volunteer basis should not be subject to the wage and hours provisions of the FLSA. Of particular concern to states and localities are the provisions of the Department of Labor's (DOL) regulations which establish the presumption that volunteer firefighters are employees whenever they receive more than \$2.50 per call as reimbursement for incidental expenses. As a result of this regulation, many of the estimated one million volunteer firefighters in the nation will be entitled to receive the minimum wage and overtime compensation for volunteer activities. This regulation will have a devastating impact on the many state and local jurisdictions which rely on volunteer firefighters.

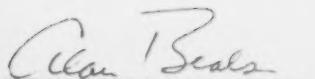
Second, the overtime provisions of the FLSA should not apply to state and local employees. Under Section 7 of the FLSA, regular employees are entitled to compensation on a time and a half basis for hours worked in a week in excess of 40. Similarly, overtime pay must be paid to firefighters for hours worked in excess of 212 in a 28 day period and to police officers for hours worked in excess of 171 in a 28 day period. These provisions mean that numerous employment practices of state and local government, many of which have been incorporated into collective bargaining agreements at the request of employees and are long-standing practices, must be ended.

For example, duty cycles for firefighters of 24 hours on duty and 48 off duty, the most common duty cycle in the nation, can no longer be utilized unless the governing body is willing to pay overtime compensation. Similarly, the practice of using compensatory time off in lieu of overtime compensation is generally not permissible under the overtime provisions of the FLSA. Under the "comp" time concept, both public safety and regular employees are allowed to accumulate compensatory time for later use as time off. This practice is advantageous to both the governmental entity, which is provided with scheduling flexibility, and the employee, who is able to take longer vacations.

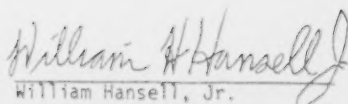
Third, a prospective effective date for the application of the FLSA to states and localities should be established. On June 14, DOL announced plans to begin enforcement actions against states and localities and to impose liability on states and localities retroactive to April 15. This retroactive enforcement policy will compound the problems caused by application of FLSA to states and localities. The FLSA regulations establish countless new regulatory requirements for states and localities, many of which are being imposed in the middle of budget cycles and collective bargaining agreements. In our view, it is essential that Congress establish a moratorium on the application of the FLSA to states and localities that will ensure an orderly and harmonious transition period.

The proposed changes in the FLSA, which are necessary to prevent undue federal interference with the operation of state and local government, must be approved by Congress as soon as possible, preferably before DOL enforcement activities begin on October 15. Furthermore, because expedited congressional action is essential, we urge your support for narrowly crafted legislation which includes only provisions relating to the application of the FLSA to states and localities.

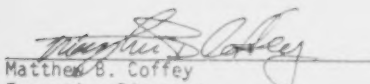
Sincerely,



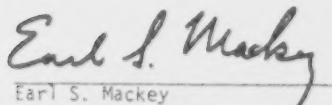
Alan Beals
Executive Director
National League of Cities



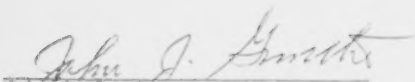
William Hansell, Jr.
Executive Director
International City Management
Association



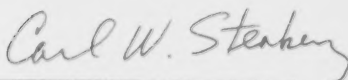
Matthew B. Coffey
Executive Director
National Association of Counties



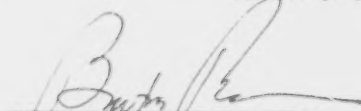
Earl S. Mackey
Executive Director
National Conference of State
Legislatures



John J. Gunther
Executive Director
U.S. Conference of Mayors



Carl W. Stenberg
Executive Director
Council of State Governments



Barton D. Russell
Executive Director
National Association of Towns
and Townships



Oklahoma Department of Public Safety

PAUL W. REED, JR.
Commissioner

P.O. BOX 11415
OKLAHOMA CITY, OKLA. 73136
10 June 1985

DARRELL WIEMERS
Assistant Commissioner

The Honorable Don Nickles
United States Senate
Washington, DC 20510

Dear Senator Nickles:

While addressing a meeting of the National Association of State Personnel Executives (NASPE) Conference in Biloxi, Mississippi, Mr. Rick Lawson of your staff indicated that the Senate Labor Sub-Committee would conduct hearings into the impact of the Garcia v. San Antonio Metropolitan Transit Authority decision on state and local governments and agencies thereof. Mr. Lawson further stated that those entities should address their items of concern to your sub-committee if, indeed, there was concern.

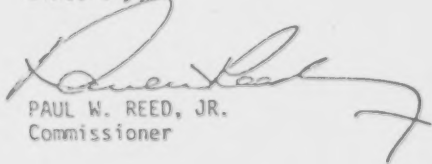
The Oklahoma Department of Public Safety has serious concern with the impact this decision will have insofar as the statewide law enforcement responsibilities of this agency are concerned. For instance, we operate an intensive stress-type academy for our prospective troopers. Based on past experience, their inclusion under the Fair Labor Standards Act will create a \$68,100 per month overtime obligation for an average of fifty (50) cadets.

Secondly, in the event of an intensive manhunt, prison riot, or natural disaster this agency would be hard pressed to fulfill its obligations if required to abide by the provisions of the Fair Labor Standards Act (FLSA).

To sum up our concerns, the inclusion of the traditional state law enforcement functions, i.e., state troopers, dispatchers, etc., under the FLSA could lead to significant deterioration of services and/or dire financial problems.

I would appreciate the opportunity to discuss this problem with either you or Mr. Lawson.

Sincerely,


PAUL W. REED, JR.
Commissioner

PWR/CD/ss0

U.S. SENATOR

Don Nickles

OKLAHOMA

FOR IMMEDIATE RELEASE
July 24, 1985

CONTACT: PAUL LEE
202/224-5754

SUPREME COURT RULING FORCES STATES TO CUT BASIC SERVICES, NICKLES SAYS

WASHINGTON--Oklahoma Senator Don Nickles today said he plans to introduce legislation to overturn a Supreme Court decision which he says could "force thousands of local governments to cut services--everything from police and fire protection to volunteer referees of sporting events."

In a five to four decision February 19, 1985, the high court mandated that the Fair Labor Standards Act (FLSA) be applied to state and local governments. This ruling in Garcia vs. San Antonio Metropolitan Transit Authority reversed a 1976 decision that FLSA requirements did not apply in "areas of traditional governmental" functions.

"This latest ruling means that many volunteers for local governments, whether they are school-crossing guards or sports referees, can no longer offer their volunteer services," Nickles said.

"Many volunteer fire departments could either be shut down or scaled back because the court ruling no longer allows comp time in lieu of overtime pay. This could also affect police protection and other basic government services."

In a letter to Nickles, the Commissioner of the Oklahoma Department of Public Safety, Paul Reed, stated "in the event of an intensive manhunt, prison riot, or natural disaster this agency would be hard pressed to fulfill its obligations" under the Garcia ruling.

"Most state governments are strapped for funds," Nickles said, "and could be forced to cut basic services to meet this new requirement. It would probably cost Oklahoma tens of millions of dollars it doesn't have."



State of Wisconsin
Office of the Governor

Anthony S. Earl

July 19, 1985

The Honorable Don Nickels
Chair, Senate Sub-Committee on Labor
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Nickels and Committee Members:

The purpose of this letter is to inform you of the effects of the Garcia v. San Antonio Metropolitan Transit Authority decision on the State of Wisconsin as an employer.

The Supreme Court's recent decision in Garcia presents some serious fiscal and operating problems for the State of Wisconsin. The primary effect of Garcia on the State is related to extending the overtime provisions of the Fair Labor Standards Act (FLSA) to employees of the State. We are currently in the process of undertaking a review of the potential cost impact of the FLSA and we do not have the final figures at this time of the costs for all State employees. However, we can share with you some information related to what we estimate the cost to be for implementing the FLSA associated with regulating the State's wildlife and fire control programs since it appears that these programs will be most affected by the implementation of the FLSA. In the wildlife and fire control areas alone, we estimate that the overtime costs for our conservation warden workforce will be \$4.4 million for the next two years. The estimated overtime costs for the fire control workforce is about \$1.7 million for the next two years as well. We are very much alarmed by these costs, particularly since resources in these program areas seem to be diminishing. Moreover, in order to fund such exorbitant overtime costs, we will be forced to raise the cost of services that are provided to the public, such as hunting and fishing licenses. The citizens of this State will be harmed by any additional increases in the cost of services in these programs.

We are faced with a serious dilemma related to how the State will fund these additional overtime costs. We do not view cutting back on services or curtailing the level of services we provide as a viable alternative. Diminishing the level of services provided in these areas will pose serious problems in the protection of the environment and will limit the access of these services to the public. Therefore, the FLSA will impair our ability to provide an acceptable level of service to the public, particularly in the area of conservation law enforcement.

Another problem area for the State is the restricted use of compensatory time under the FLSA. The State has had the flexibility of granting "comp" time to employees in lieu of cash overtime payments. "Comp" time as a substitute for overtime pay is practically eliminated by the FLSA. We recommend that the FLSA be amended to include a provision to grant employees the option to elect either "comp" time or cash payment for overtime hours worked. If employees were granted such an option, governmental employers would not find it necessary to drastically restructure their employees' work periods to avoid massive overtime liability.

The FLSA poses a problem for the State's commitment to provide alternative work patterns and flexible scheduling for its employees. The State of Wisconsin has a strong commitment to affirmative action and as a means of promoting affirmative action in its employment practices, an explicit policy to allow flex-time has been adopted. The FLSA seems to be very inflexible about granting overtime equal to one and one-half times employees' regular rate of pay for hours over forty in a seven-day work week for the majority of covered employees. The cost of continuing our flex-time and alternative work pattern programs will increase substantially and we fear that these increased costs will seriously impair our ability to allow employees to participate in these programs.

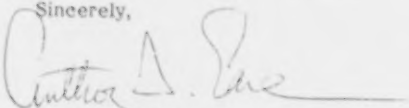
We surely will begin to see a retrenchment in the gains that we have made in this State in affirmative action if we do not get the relief that we seek to allow more flexibility in the administration of the FLSA. It is our understanding that federal employees are covered by a special exemption which allows the utilization of flex-time programs on a wide-scale basis. We recommend that this type of exemption be extended to state and local governments as well.

Lastly, there will be exorbitant costs associated with modifying the State's payroll and data processing systems to ensure compliance with the FLSA. Given the complexities involved with fully complying with all requirements, we strongly urge that state and local governments be given a substantial time extension in which to fully comply with FLSA.

We join with other states in voicing our concerns regarding the adverse and serious ramifications that the Garcia decision will have on state governments. The Garcia decision will pose a financial hardship on both the State and its citizens. We solicit your help in obtaining whatever administrative relief possible to address the concerns raised herein.

On behalf of the people of the State of Wisconsin, I thank you for the opportunity to provide information on the effects of the Garcia decision.

Sincerely,



Anthony S. Earl
GOVERNOR

Testimony submitted to the U.S. Senate Committee on Labor and Human Resources, Subcommittee on Labor
August 12, 1985

The Board of Directors of New Ways to Work is concerned about the U.S. Supreme Court Garcia decision as it impacts alternative work schedules that have been negotiated by public employee unions. These schedules are in the interest of both employees and employers. We submit for your consideration the following:

(1) Although some public employees need the protections of the Fair Labor Standards Act,

(2) Some public employees and employers have benefitted from alternative work schedules that were negotiated prior to the Garcia decision. They wish to retain these schedules.

(3) Many private sector employees and employers would also like to implement alternative schedules that might not be in compliance with the Fair Labor Standards Act.

Therefore, we propose that this committee recommend changes in the FLSA that would allow for a waiver of the maximum hours provision through collective bargaining or by a two thirds vote of the affected employees.

Most of the public discussion in the wake of the Garcia decision has centered on the increased cost and potential danger to public safety of bringing state and local governments into compliance with the FLSA. But little, if anything, has been said about the impact of this decision on the lives of working people, an irony given that a major intent of the FLSA was to provide worker protections. Yes, certain workers, like Garcia, will be better off under the provisions of the Act. But other workers, who enjoyed alternative work schedules prior to the Garcia decision, now find themselves boxed into standard 40-hour workweeks as their employers terminate all other options. (See attachment A.)

The termination of alternative work schedule programs is a major problem for the affected employees. For many, it means aggravating the already difficult job of balancing work and family responsibilities. For some, it could even mean the difference between working and not working, as they find themselves unable to meet a standard work schedule. For all workers, it will mean fewer options about when they work, and therefore, less control over how they use their time.

Discontinuing these programs also affects employers adversely. Alternative scheduling often gives them more flexibility to meet the demands of their business while simultaneously improving morale and productivity and decreasing employee turnover.

Provisions to allow for waiver (either through collective bargaining or by a two thirds vote of affected employees) of the

maximum hours provisions of the FLSA would provide employers and employees more flexibility over work schedules without undermining the worker protection function initially intended by the act. The State of California currently has provisions in its labor code that allow for waiver of its more stringent maximum hours protections, under certain specified conditions. Therefore, Congress has a precedent for such legislation as well as a model that can be examined for its feasibility.

In addition to providing more flexibility, provisions for a waiver would mitigate the financial problems resulting from the Garcia decision, as those states and local governments that have collective bargaining agreements not in compliance with the FLSA would be able to retain those agreements.

(New Ways to Work is a private, non-profit organization that promotes alternative work schedules and equity for workers choosing them.)

STATE OF MICHIGAN



JAMES J. BLANCHARD, Governor

DEPARTMENT OF LABOR

309 N. WASHINGTON, BOX 30015, LANSING, MICHIGAN 48909
Elizabeth P. Howe, Director

BUREAU of EMPLOYMENT TRAINING

JUL 15 1985

AM 7:8,9,10,11,12,3,4,5,6 PM

4

July 12, 1985

TO: Management Operating Committee

FROM: Elizabeth P. Howe, Director *E. P. Howe*

SUBJECT: Termination of Modified Work Schedules

On June 28, 1985 Attorney General Kelley issued an informal opinion indicating that the United States Supreme Court decision in the case of Garcia -VS- San Antonio Metropolitan Authority mandates the State of Michigan to comply with the provisions of the Fair Labor Standards Act with respect to the classified service. Further, the federal Department of Labor has advised that the effective date of coverage is April 15, 1985. Of principal concern in this matter, at this time, is the application of the overtime provisions of the Act and the likelihood of retroactive overtime liability for non-exempt employees.

The Office of the State Employer will provide interpretive guidance regarding the application of the Act and steps necessary to bring each bargaining unit covered by a collective bargaining agreement into compliance. The Department of Civil Service is preparing guidelines and recommendations necessary to modify the general timekeeping procedures in order to comply with the Act. However, I am concerned that current departmental policy and practice which permits employees to participate in modified work schedule arrangements may continue to expose the department to overtime compensation liability by permitting employees to work in excess of a forty hour week. Under the Act non-exempt employees are eligible for overtime compensation for all hours of work in excess of forty hours in a work week. The overtime rate of one and one-half times the regular hourly rate is applicable for such hours.

In order to minimize the departmental liability for overtime payments and in an effort to curtail potential accumulation of overtime payment liabilities, I am directing that you provide notice to all employees under your administrative jurisdiction that modified work schedules of all types are to be terminated. Department Policy (2/2/2.1) requires one pay period advance notice to affected employees. Accordingly, all modified work schedule arrangements are to terminate effective July 29, 1985.

Further, employees should be advised that although I am rescinding current departmental policy which establishes the optional work schedule arrangements and, thereby, requiring all employees to work traditional work schedules such action does not necessarily indicate that all forms of adjusted work schedule arrangements will be prohibited after further study and review has taken place. I have directed the Office of Personnel and Labor Relation to begin to review such possibilities and provide recommendations to me. However, my decision to authorize adjusted work schedules will be based primarily upon a program which is demonstrably manageable and overall in the best interest of the State.

Senator NICKLES. Again, I will work on legislation, as I outlined previously, that I think will address many of the concerns, the retroactive date, the volunteers which you mentioned, and the flexibility to offer the comp time in lieu of overtime. I hope to have that together in the not-too-distant future.

Mr. AIONA. Senator, would you allow me to make one more comment?

Senator NICKLES. Certainly.

Mr. AIONA. In Honolulu, we have a police reserve system which dates back to 1939. The program is strictly a volunteer program; they must comply and meet all the minimum requirements of recruit training, then come out once a week and put in 8 hours a day. Those people would then fall within this problem that we are seeing. On Maui, we have 10 reserve officers that do the same thing. I think we're going to have some real problems if these volunteers are involved in the process.

Senator NICKLES. I think the argument on volunteers is very important, and I appreciate your statements for bringing it out. If people say this really won't make any difference to them because they are already paying time and a half, I don't think they have looked at the volunteer provision and how far reaching that might be; all the way down into the school districts, et cetera. It's pretty far reaching.

Again, I want to thank you. We are going to keep the record open. As I mentioned, we will have further hearings.

With that, we will adjourn the committee.

[Whereupon, at 1:04 p.m., the hearing was concluded.]

FAIR LABOR STANDARDS AMENDMENTS OF 1985

WEDNESDAY, AUGUST 28, 1985

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Oklahoma City, OK.

The subcommittee met at 9 a.m., in the House of Representatives Chamber, State Capitol Building, Oklahoma City, OK, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senator Nickles.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning. Today is the second of a 3-day hearing conducted by the Senate Labor Subcommittee on the impact of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority* to apply the Fair Labor Standards Act to State and local governments.

As I have traveled around the State of Oklahoma for the past 3 weeks, it has become apparent that this ruling will have a far greater impact than first realized.

At the first hearing I held on this issue in Washington, DC last month, I was informed by the head of the Oklahoma Office of Personnel Management that this decision will cost the State of Oklahoma at least \$6 million. This figure does not include the millions of dollars the ruling will cost at the local level for the cities, counties, and States. The city of Stillwater, for example, estimates the cost to that city alone will be \$630,000.

The Wall Street Journal recently claimed that nationwide we could be paying out as much as \$3 billion. State and local governments around the Nation just do not have the money, in many cases, to comply with the Court's ruling. This means that in many cases taxes will have to be raised or services cut, and I do not believe either is an acceptable solution.

As chairman of the Labor Subcommittee, I have introduced legislation to overturn this decision. I believe, and I think it is awfully important, that we allow these decisions to be made on the State and local level and not be mandated by the Federal Government.

I really do not care whether people pay the overtime or whether they offer the comp time, but I think you should have those options. And whatever is worked out between the employees and the city, or the public entity, should be their decision to make. It should not be mandated by the Federal Government. The legislation I have introduced would do basically that.

It would exempt the State, counties, and cities from the Fair Labor Standards Act. It would also exempt volunteers for State and local governments from the Fair Labor Standards Act. Without this legislative correction, we find that anything basically received over \$2.50 for anything be subject to interpretation of the act. Basically we find that it would be prohibitive to volunteer services.

Also, another provision of the act would be that we would lose the retroactive date to February 19, 1985, the day the Supreme Court handed down its *Garcia* opinion. The purpose of that would be to try and stop a multitude of litigation coming forth.

The bill that I have introduced, S. 1570, currently has 24 cosponsors, both Democrats and Republicans. This is not a partisan issue. The legislation is supported by the National League of Cities, the National Association of Counties, and the National Conference of State Legislatures. I hope that we will be successful in moving the legislation forward when we return in September.

We have many good witnesses today. I think they can shed some light on what the impact of this decision would be.

Our first witness is Jim Hopper, who is a staff member for Senator Boren. I personally have talked to Senator Boren on this issue, as well as many others, and I appreciate his comments and look forward to working with him.

Mr. Hopper, do you have any opening comment?

Mr. HOPPER. Senator, we appreciate the opportunity to come and testify. I have a very brief statement from the Senator Boren. I know that you have a lot of witnesses who have a lot more to say about this than we do. I would like to briefly read this. We also would like to say that when the Senate goes back in session in September, you will have at least a 25th cosponsor to your bill.

Senator NICKLES. I appreciate that. Thank you.

Mr. HOPPER. I will read this brief statement from Senator Boren.

Mr. Chairman, I want to take this opportunity to thank you for allowing my statement to be read by one of my staff members. I commend you for the leadership you have shown in introducing this legislation, Senate Bill 1570, which will go a long way toward easing the impact of the recent Supreme Court decision in *Garcia v. San Antonio Metropolitan Transit Authority*.

The communities in Oklahoma, as well as those in other States, will never be able to afford the tremendous costs associated with meeting the requirements for overtime pay contained in this decision. It is estimated that the additional costs to Oklahoma communities alone would be a minimum of \$5 million. Taking the needed money to meet these requirements from other parts of local budgets will reduce spending on other services badly needed by the public. We should be taking actions to reduce the costs of government instead of imposing additional burdens on local governments that they cannot afford.

In addition, local governments should have the needed flexibility to make decisions concerning wages, hours, overtime regulations, and other labor functions. The recent Supreme Court decision has effectively removed this flexibility and undermines State and local government autonomy. In the past, collective bargaining agreements have adequately met the concerns regarding compensatory time off for overtime hours.

Mr. Chairman, your bill, S. 1570, is an excellent starting point to address this issue. Amending the Fair Labor Standards Act to exempt State employees and employees of political subdivisions of the State from the provisions of the Act relating to maximum hours is the correct means of removing this burden from the State and local governments.

I intend to support Senate bill 1570 which will bring relief to our States and cities from the onerous requirements of the *Garcia* decision. As soon as the Senate returns from the Labor Day recess, I will add my name as a cosponsor of this bill and will work with my colleagues to see its speedy passage.

Thank you again for allowing this statement to be read in my behalf. I commend you for your efforts and pledge my support to help you pass this bill.

Mr. Chairman, we also ask that a copy of the Senator's statement be included in the record.

Senator NICKLES. We certainly will include it in the record.

[The prepared statement of Senator Boren follows:]

STATEMENT OF SENATOR DAVID L. BOREN

before the Senate Committee
on Labor and Human Resources
State Capitol Building, Oklahoma City, Oklahoma

August 28, 1985

Mr. Chairman, I want to take this opportunity to thank you for allowing my statement to be read by one of my staff members. I commend you for the leadership you have shown in introducing this legislation, Senate Bill 1570, which will go a long way toward easing the impact of the recent Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority.

The communities in Oklahoma, as well as those in other states, will never be able to afford the tremendous costs associated with meeting the requirements for over-time pay contained in this decision. It is estimated that the additional costs to Oklahoma communities alone would be a minimum of \$5 million. Taking the needed money to meet these requirements from other parts of local budgets will reduce spending on other services badly needed by the public. We should be taking actions to reduce the costs of government instead of imposing additional burdens on local governments that they cannot afford.

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regulations and other labor functions. The recent Supreme Court decision has effectively removed this flexibility and undermines state and local government autonomy. In the past, collective bargaining agreements have adequately met the concerns regarding compensatory time off for overtime hours.

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I intend to support Senate Bill 1570 which will bring some relief to our states and cities from the onerous requirements of the Garcia decision. As soon as the Senate returns from the Labor Day Recess, I will add my name as a co-sponsor of this bill and will work with my colleague to seek its speedy passage.

Thank you again for allowing this statement to be read in my behalf. I commend you for your efforts and pledge my support to help you pass this bill.

Senator NICKLES. Mr. Hopper, I very much appreciate your appearance today, and also the support of Senator Boren. We work together, as you know, on many things, and I appreciate his help and efforts. Thank you.

Next is David Way who is the senior administrative assistant for Governor Nigh.

Mr. WAY. I have a letter, dated August 28, 1985, to Don Nickles.

Dear Senator Nickles: As Governor of Oklahoma, I wish to take this opportunity to urge Congress to act immediately to modify the action taken by the United States Supreme Court in the *Garcia v. San Antonio Metropolitan Transit Authority* ruling of February 19, 1985. As you are well aware, this ruling places all State and local governments under the Fair Labor Standards Act as it pertains to minimum wage and overtime pay.

Oklahoma has a strong commitment in support of overtime pay and minimum wage as established in the Fair Labor Standards Act of 1937. It is our position that the State is in compliance with the provisions of the FLSA. However, many negative variables exist as a result of the Garcia ruling.

In addition to creating a multitude of administrative and fiscal problems, the ruling will work to the disadvantage to those State and local government employees who prefer the option of compensatory time off in lieu of overtime pay. The ruling threatens to destroy the flexibility needed by State and local governments to respond to emergency situations, such as floods, fire, police and medical emergencies, wherein additional physical effort is required to be put forth by a normal complement of personnel for a period of time. Small communities which utilize volunteer firefighters could ultimately face fiscal ruin because such volunteers may be non-exempt under the provisions of the Act. State and local government entities had established procedures to accomplish these emergency periods where added effort was required; procedures which work to the best interest of all involved. It is my opinion that the Garcia ruling will destroy the States' capability to manage available manpower and funds in the most efficient manner possible. The projected fiscal impact of the ruling for Oklahoma during fiscal year '86 is approximately \$12 million.

I encourage you to pursue the restoration of the FLSA provisions back to those in existence prior to the February 19, 1985, ruling of the Court. Consideration should be given to deferring implementation of the Court decision until Congress can adequately determine the fiscal and administrative impact of Garcia upon all the States. Furthermore, State and local governmental entities should be given immunity from litigation during this critical interim period.

Your interest in this matter is most appreciated. If I may be of further assistance, please do not hesitate to contact me.

Signed, Sincerely, George Nigh.

[The full text of the letter referred to follows:]



STATE OF OKLAHOMA
OFFICE OF THE GOVERNOR
OKLAHOMA CITY

GEORGE NIGH
GOVERNOR

August 28, 1985

The Honorable Don Nickles
United States Senate
Washington, D.C. 20510

Dear Senator Nickles:

As Governor of Oklahoma, I wish to take this opportunity to urge Congress to act immediately to modify the action taken by the United States Supreme Court in the Garcia vs. San Antonio Metropolitan Transit Authority ruling of February 19, 1985. As you are well aware, this ruling places all state and local governments under the Fair Labor Standards Standards Act as it pertains to minimum wage and overtime pay.

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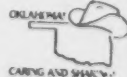
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Your interest in this matter is most appreciated. If I may be of further assistance, please do not hesitate to contact me.

Sincerely,

George Nigh
George Nigh



Senator NICKLES. We appreciate Governor Nigh's statement. I also appreciate his support in this measure. Just to make sure that you are aware that he mentions that, we try and make sure the Government entities would be given immunity from litigation during this interim period. That is the reason why we set the effective date back on the Court's decision to take care of it. Again, I appreciate the statement.

I served, as some of you know, for 2 years in the State senate. One of the things that always bothered me was when I found the Federal Government making decisions that I felt we should be making either on a State or county level, or maybe on the city level. I personally think that is the reason why we have county and city commissioners, mayors, and the State legislature. We believe in government by the people.

Most of you are probably aware that it was a five to four Supreme Court decision which overturned the previous ruling. I think their previous ruling was right. Previously, they said the tenth amendment to the Constitution would prevail. The tenth amendment says that the power is not delegated to the United States by the Constitution, nor prohibited to it by the States, but are reserved to the States respectively or to the people. Our forefathers wanted to reserve the basic decisions except for those enumerated by the Constitution to the Federal Government. They wanted to reserve the balance of those decisions for the States and to the people.

Now, this again is a case where the Court can sometimes—and sometimes Congress does it—say we will make those decisions for you instead of letting the States and the people make those decisions. Again, the fact that it was a five to four vote on two different decisions indicates it was a close call by the Courts. Hopefully, we will be able to change that.

Thank you very much for your statement.

Next we are pleased to have John Cantrell, who is president of the County Officers and Deputies Association of Oklahoma; Roy Gardner, Police and Fire Commissioner from Tulsa, OK, and Randy Orndorph, who is president of the Fraternal Order of Police in Tulsa.

If all of you would come up to the first row of chairs.

I understand you had a hearing last week in Tulsa. I would be interested in the findings of what came out of that hearing. My administrative assistant, Doyce Boesch, attended those. We would like to make that hearing part of this record.

Mr. Cantrell, do you care to be first?

STATEMENTS OF JOHN F. CANTRELL, PRESIDENT, COUNTY OFFICERS AND DEPUTIES ASSOCIATION OF OKLAHOMA; ROBERT H. (ROY) GARDNER, POLICE AND FIRE COMMISSIONER, TULSA, OK; AND RANDY ORNDORPH, PRESIDENT, FRATERNAL ORDER OF POLICE, TULSA, OK

Mr. CANTRELL. Mr. Chairman, I appreciate this opportunity to present this testimony before this committee on the effect of the *Garcia* decision on local government and, more particularly, county government.

I am John Cantrell, the County Treasurer of Tulsa County and, at the present time, am serving as president of the Oklahoma County Officers and Deputies Association, whose membership is open to all county officers of the State of Oklahoma and all deputies employed by those county officers.

I might preface these remarks by what happened at the Tulsa hearing. The hearing was sponsored by the county. There were many counties that were there. There were many cities that were represented there. There was labor that was represented there—not labor unions—but I am talking about the Fraternal Order of the Police and the Firemen.

At the conclusion of the hearing, the question was asked, "Was there anyone in the audience who was opposed to this bill and in favor of the *Garcia* decision"? Bearing in mind that this open meeting had quite a bit of publicity by newspaper, radio, and television, not one hand went up opposing your bill or in favor of the *Garcia* decision. As a matter of fact, I believe that Mr. Orndorph with the police department will give some testimony here that will surprise you. I think he lists 100 percent of the police force voted in favor of comp time as opposed to overtime.

With those brief remarks, I would like to tell you that, due to the short time between the notification of this meeting and the meeting date itself, it was impossible to determine the full financial impact that this decision may have on the 77 counties of the State of Oklahoma. Most counties are not even computing what the financial impact will be to them because it would be an act in futility. They do not have the money to pay it so why know what it is? They are not going to pay it.

It only leaves one alternative. You might say you have the alternative of raising taxes but, as you well know, Senator, Oklahoma has a balanced budget amendment in our constitution. Our tax rates, in most instances, are set by the constitution, and the people, in the frame of mind that they are in today, are very reluctant to vote tax increases. So there is only one alternative, and that is the reduction of services.

In addition to the financial hardships, it leaves the counties and the county officers in the position of not being able to employ good sound management ability. Every employee who I have talked to who would be subject to the "overtime provision versus comp time off" prefers the "comp time" approach. This gives the employees more time to participate in other activities of their choice, whether it be with the family, educational pursuits, recreational pursuits and, in some cases, yes, other employment, part-time jobs. These employees, generally and almost without exception, value the "comp time" higher than the remuneration they would receive in the form of overtime pay. Many employment agreements with labor unions provide for comp time, and if the Fair Labor Standards Act is implemented, it will result in many labor contracts having to be renegotiated.

The jobs, particularly in highway construction and maintenance, park construction, maintenance and operation, law enforcement agencies, including our juvenile system, require shifts to be worked in excess of the provisions of the Fair Labor Standards Act, or they become jobs which are seasonal in nature which lend themselves to

the proposition of "comp time." These factors enable management to exercise intelligent managerial functions and, further, to exercise good time management on an economical basis.

It is unfortunate that we do not find criminals working a 40-hour week, fires only burning 8 hours a day and 40 hours a week, water mains and sewers only requiring maintenance during a standard 40-hour week, and floods only happening during a regular 40-hour week. Gentlemen, these are emergencies that need to be dealt with on an emergency basis and at the time the need arises. Likewise, these jobs need to be finished as soon as possible and in the most economical manner. The *Garcia* decision will not permit this.

Imagine, if you will, a devastating fire. The fire being fought by a capable and experienced group of fireman; the fire almost under control, but requiring an estimated additional 2 hours of work to finish the job. The firemen turn off the water, stow their equipment, and leave the scene because the workday is over and the fire department has no money to pay overtime. This happens to be at the end of their work cycle.

Mr. Chairman, similar examples can be given whether it be fire-fighting, a manhunt for a fugitive, laying asphalt over concrete, repairing or constructing recreational facilities, and the list goes on and on.

We have many volunteer fire departments, law enforcement agencies, recreational facilities, and educational facilities which are staffed by conscientious volunteers. These programs will cease to exist under the *Garcia* decision.

State and local governments are unlike private businesses in that we must operate within a budget which provides limited revenues. Private business can and does pass on to the consumer additional costs of goods and services in the form of price increases. This we cannot do.

In conclusion, I would strongly urge that the Congress of the United States render the provisions of the Fair Labor Standards Act resulting from the *Garcia* decision void as it applies to State and local governments.

Thank you.

[The prepared statement of Mr. Cantrell follows:]

JOHN F. CANTRELL
TULSA COUNTY TREASURER
PRESIDENT - COUNTY OFFICERS AND
DEPUTIES ASSOCIATION OF OKLAHOMA

Text of Testimony on the Fair Labor Standards Act and the Impact of the
United States Supreme Court Decision in the case of:

Garcia vs. San Antonio Mass Transit Authority

PUBLIC HEARING
WEDNESDAY, AUGUST 28, 1985
CHAMBERS - HOUSE OF REPRESENTATIVES
STATE OF OKLAHOMA
OKLAHOMA CITY, OKLAHOMA

Mr. Chairman, Members of the Committee:

I appreciate the opportunity to present the following testimony to this Committee relative to the Garcia Decision on the Fair Labor Standards Act and the effect of that decision on local government and more particularly, county government in the State of Oklahoma.

My name is John F. Cantrell and I am the elected County Treasurer of Tulsa County and at the present time, am serving as President of the Oklahoma County Officers and Deputies Association, whose membership is open to all county officers of the State of Oklahoma and all deputies employed by those county officers. Due to the fact that only a short period of time elapsed between notification of this meeting and the meeting date, it is impossible to determine the full financial impact that the decision may have on the seventy-seven counties of the State of Oklahoma. Many county officials and many counties are not attempting to compute the financial burden which is placed upon those counties as a result of this Supreme Court decision. The reason they are not doing this is due to the fact that, regardless of the potential cost, the counties do not have the money to pay the bill. Not having the money to pay the bill leaves these counties and county officials with only one alternative — the reduction of services.

In addition to the financial hardships, it leaves the counties and county officers in the position of not being able to employ good sound management ability. Every employee who I have talked to who would be

subject to the "overtime provision versus comp time off" prefers the "comp time" approach. This gives the employees more time to participate in other activities of their choice whether it be with the family, educational pursuits, recreational pursuits and in some cases, yes, other employment. These employees generally and almost without exception, value the "comp time" higher than the overtime which they would otherwise earn. Many employment agreements with labor unions provide for comp time and if the Fair Labor Standards Act is implemented, it will result in many labor contracts having to be renegotiated. In a recent vote, the Police Department of the City of Tulsa voted unanimously to oppose the Fair Labor Standards Act provision which requires overtime instead of "comp time" which their labor contract provides. It is expected that the Fire Department will do likewise.

Those jobs, particularly in highway construction and maintenance, park construction, maintenance and operation, law enforcement agencies including our juvenile system, require shifts to be worked in excess of the provisions of the Fair Labor Standards Act and/or they become jobs which are seasonal in nature which lend themselves to the proposition of "comp time". These factors enable management to exercise intelligent managerial functions and further to exercise good time management on an economical basis. It is unfortunate that we do not find criminals working a forty hour week; fires only burning eight hours a day and forty hours a week; water mains and sewers only requiring maintenance during a

standard forty hour work week and floods only happening during regular forty hour work week hours. Gentlemen, these are emergencies that need to be dealt with on an emergency basis and at the time the need arises. Likewise, these jobs need to be finished as soon as possible and in the most economical manner. The Garcia Decision will not permit this.

We have many volunteer fire departments, law enforcement agencies, recreational facilities and educational facilities which are staffed by conscientious volunteers. These programs will cease to exist under the Garcia Decision.

State and local governments are unlike private businesses in that we must operate within a budget which provides limited revenues. Private business can and does pass on to the consumer additional costs of goods and services in the form of price increases.

In conclusion, I would strongly urge that the Congress of the United States render the provisions of the Fair Labor Standards Act resulting from the Garcia Decision void as it applies to state and local governments.

Thank you.

Senator NICKLES. Thank you very much, Mr. Cantrell.
Mr. Gardner.

Mr. GARDNER. Senator, I would like to thank you for allowing me to speak on the way the *Garcia* decision affects the city of Tulsa.

As the police and fire commissioner in Tulsa, I feel doubly qualified in this matter because 95 percent of the burden involved at the city will fall on my two departments. The city stands to be out \$1½ million. We do not know where the money would come from.

I cannot argue the constitutional issues involved in the *Garcia* decision, but I think I can offer a reasonable administrative perspective on the matter.

Besides the cost, there is one other issue that comes to my mind. Are we being fair to the employee?

Police overtime would create our greatest financial liability under the new rules. We have special considerations where the police officers are concerned. For one thing, we cannot schedule their court appearances. When a judge tells us a specific officer has to testify in a specific case at a specific time, that officer has to be there, regardless of whether it is his day off or not, on his shift, or any other reason. We could lose a case after hours of painstaking investigation if one officer missed his court date.

In other instances, an officer may need to work odd hours to crack a case or talk to a certain witness. We schedule 40-hour weeks, but 40 hours will not always do the job.

To be fair with our employees, we offer them an option. An officer can choose to be paid overtime, or he can choose to take the time off later. It is in his contract. The officer has the choice.

The way I understand the *Garcia* decision, our officers may lose that right of choice for comp time. We may have to go back and change the contract in a way that neither of the interested parties wants. I would hardly call that enlightened, progressive labor relations.

In the fire department, on the other hand, we face up to one-quarter million dollars in overtime because the timing restrictions prescribed by the FLSA do not coincide with our current scheduling practices. The maximum work period for fire service personnel under the new rule is 28 days. Our current practice follows a 45-day cycle. We employ what I believe to be an industry standard of 24 hours on duty, then 48 hours off.

This is a very logical schedule. I would have a hard time justifying the contortions we would have to go through to comply with the FLSA requirements. I might say, incidentally, that most of our men prefer their current schedules. They resist any reassignment that would put them on a normal 40-hour week from eight to five.

We can and will obey the law. Regardless of that, the *Garcia* decision places a weight on our backs that is neither sensible nor easy. It weighs down on the administrator. It weighs down on the taxpayer. It weighs down on the employee. Anything that you can do to lift that burden will benefit all those classes of people. As far as I can tell, that includes just about everybody.

I would also like to place in the record a statement from our chief of police, and I will read that for him.

The *Garcia* decision has the potential to do more harm to the Tulsa Police Department than any other Court decision in history. The elimination of compensatory

time is an optional form of payment for overtime. It has the potential to cause us to lose the best and brightest of our young officers. Equally important, it may all but destroy our recruitment program.

Our department, like most police departments, bases most of its personnel assignments on seniority. Officers with the least seniority typically work evenings and nights. Officers with the most seniority typically work days. Within those shifts, officers with the most seniority usually have weekends or part of the weekend off. Those with less seniority end up with Tuesdays and Wednesdays, Wednesdays and Thursdays off. It is an unpleasant arrangement for those who cannot get weekends off, and on day shift that includes 16-year veterans. But it is the fairest system yet devised, and it is regarded as equitable by our officers.

The optional use of compensatory time allows our officers to a limited seniority to approve that time, if they so desire, and periodically use it to enjoy a normal day off. We owe it to the citizens we protect, to continue our efforts to always recruit the most honorable and intelligent officers that we can. But we are now going to have to tell these recruits that for years, except for their vacations, they will never have even one weekend off. We will have to tell them that, in addition to their odd hours, they will have to try to create or maintain a normal social life on Tuesdays and Wednesdays only. If they happen to have a family, we are going to have to tell them that for years they will never be able to take their spouse and children to a Saturday evening movie. They will never be able to take a weekend trip. We will have to tell them that the odds are against them being able to spend their children's birthdays with them or even being able to attend their child's school program. We will have to tell them that this Court decision will deny them the privilege of enjoying all these things. Then, after that, we will offer them a job, and I doubt that we will get many takers. And I am not sure we want anybody who would want to take that job under those conditions.

And what about the officers already in the department? If you were a college-educated professional, perhaps 24, 25 years old, and you were suddenly told that you would no longer be able to spend a special occasion with your family or maintain even a semblance of normalcy in your personal life, what would you do? I predict that many of those officers would leave the department and find another profession. And I cannot say that I blame them.

All people, particularly those in stressful occupations, such as police work, must strike a healthy balance between their responsibility to their profession and their responsibility to themselves and their loved ones. Compensatory time permits officers to do that. It allows them to join in the mainstream of society and be a total member of their community. Recruitment and retention problems are but two of the deleterious effects of this decision.

I could speak for hours on the numerous ways it would cause curtailment in police service. This decision must be changed for the continued progress of law enforcement in the United States.

I urge the Supreme Court and the Congress to reexamine and reconsider this decision and its ramifications and encourage all the citizens to join with us in seeking to bring this change about.

[The prepared statement of Mr. Gardner follows:]



ROBERT H. (ROY) GARDNER

CITY HALL

POLICE AND FIRE COMMISSIONER

TULSA, OKLAHOMA

74103

STATEMENT OF COMMISSISONER ROY GARDNER
BEFORE THE PUBLIC HEARING
ON THE FAIR LABOR STANDARDS ACT

August 28, 1985

Senator, I would like to thank you for allowing me to speak on the way the Garcia decision affects the City of Tulsa. As Police and Fire Commissioner, I feel qualified in this matter, because ninety-five percent of the burden involved at the City will fall on my two departments.

We take a conservative financial posture in Tulsa, so naturally our figures are on a worst case assumption. But if everything happens that could happen, the City stands to be out one and one-third million dollars. I don't know where the money would come from.

I can't argue the constitutional issues involved in the Garcia decision, but I think I can offer a reasonable administrative perspective on the matter. Besides the cost, there is one other issue that comes to my mind. Are we being fair to the employee? I think it is traditional in local government that if you aren't taking advantage of anyone, you try to do things with as much thrift as possible.

Police overtime would create our greatest financial liability under the new rules. We have special considerations where the police officers are concerned. For one thing, we can't schedule their court appearances. When a judge tells us a specific officer has to testify in a specific case at a specific time, that officer has to be there, regardless of whether it is his day off, or not on his shift, or any other reason. We could lose a case after hours of painstaking investigation if one officer missed his court date.

Roy Gardner
Page 2

In other instances, an officer may need to work odd hours to crack a case or talk to a certain witness. We schedule forty hour weeks, but forty hours won't always do the job.

To be fair with our employees, we offer them an option. An officer can choose to be paid overtime, or he can choose to take an hour off later for every hour he worked over. It's in the contract. The officer has the choice.

Taking the nature of the officer's job into consideration, we can't necessarily work compensation time into the same period as when he worked over. If he chooses comp time, though, he will always get it.

The way I understand the Garcia decision, our officers may lose that right of choice for comp time. We may have to go back and change the contract in a way that neither of the interested parties wants. This mandate cuts down on the options available to the working officers. I would hardly call that enlightened, or progressive, labor relations.

In the Fire Department, on the other hand, we face up to one-quarter million dollars in overtime because the timing restrictions prescribed by the FLSA don't coincide with our current scheduling practices. The maximum work period for fire service personnel under the new rules is 28 days. Our current practice follows a 45-day cycle. We employ what I believe to be an industry standard of 24 hours on duty, then 48 hours off.

If we continue to schedule as we currently do, we will have to pay time and one-half for the periods when the work weeks coincidentally run more than 53 hours, but we won't get the extra pay back in the next period when the lag catches up and the firefighter works less than that.

There is no evidence I am aware of that shows we set up this schedule to gyp the firefighter. In fact, this is a very logical schedule. I would have a hard time justifying the contortions we would have to go through to comply with the FLSA requirements. I might say, incidentally, that most of our men prefer their current schedules. They resist any reassignment that would put them on a normal forty hour work week from eight to five.

Senator Nickles, I think you know that we can learn to live with almost anything. We can, and will, obey the law. Regardless of that, the Garcia decision places a weight on our backs that is neither sensible, nor easy. It weighs down on the administrator. It weighs down on the taxpayer. It weighs down on the employee. Anything you can do to lift that burden will benefit all those classes of people. As far as I can tell, that includes just about everybody.

Senator NICKLES. Thank you, Mr. Gardner.

Mr. Orndorff.

Mr. ORNDORFF. Senator, thank you for allowing me to be here today also.

I would simply like to read the position of the police in Tulsa, and then I have another part for the record.

You just heard the comments made by the chief of police in Tulsa. We agree with those comments. As working police officers, we recognize that we are subject to extreme stress caused by the nature of our work. We are very aware of the detrimental effects on us both in physical and mental areas.

In our jobs, we are often brought face to face with fatal automobile crashes, brutal murders, child brutality cases, and many other distasteful situations. These pressures can often best be handled by getting away from it all for a brief period. That is why we feel it is imperative we have compensatory time to take off. To deny officers the opportunity to take off other than their normally scheduled days can only create situations detrimental to them and the citizens they serve.

It appears that, in our area, the *Garcia* decision is attempting to fix something that is not broken. We do not have the full understanding of the entire problem, and based on that we make the following suggestions:

We would like to, and this was written prior to your bill introduced, impose legislation which would exempt municipalities whose unions want compensatory time, allow this to be a matter between the unions and the municipality.

We do appreciate what you are trying to do. We hope that this next item offers some support.

I have before me a copy of the petition that is being circulated in our area. I brought only a copy today because the petitions are still being circulated. The actual petitions will be mailed to you at a later time. The decision reads as follows:

The undersigned citizens petition the Members of Congress and all public officials to take immediate action to overturn the limiting and restrictive interpretation of the Supreme Court decision styled *Garcia v. San Antonio*.

We submit that the employees of public agencies have entered into good faith employment contracts in which they are granted the right to elect to receive some compensation for overtime in either cash or compensatory time, and their contract rights should be recognized and preserved.

Further, we petitioners believe that the chaos will reduce public services that will result in a blanket application in Court's ruling is not in the public interests. It is clear, for example, that if police officers must be paid in cash for overtime hours spent in court, that there will be many criminal offenders avoiding prosecution simply because a government body does not have sufficient public funds to provide present level services, and we would submit that these kinds of people are getting loose quickly enough without additional help.

In short, state rights, the freedom of choice, the right to contract in a public interest, should be preserved by immediate action to reverse the effect of the interpretation of *Garcia v. San Antonio*. This petition and duplicate copies thereof are signed for presentation to all interested and/or public officials.

Thank you, sir.

[Information supplied follows:]



FRATERNAL ORDER OF POLICE

Promoting the Welfare of Law Enforcement Officers in Oklahoma

TULSA LODGE 93
3055 S. JOPLIN • TULSA, OKLAHOMA 74114

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President

August 22, 1985

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To Whom It May Concern:

Attached is a copy of comments made by Tulsa Police Chief R. N. Dick. As a union, we fully and unanimously support those comments.

As working police officers, we recognize that we are subject to tremendous stressors caused by the nature of our work. We are very aware of the detrimental effects on us in both physical and mental areas.

In our jobs, we are often brought face to face with fatal automobile crashes, brutal murders, child brutality cases, and many other distasteful situations. These stressors can often best be handled by getting away from it all for a brief period. That is why we feel it is imperative we have compensatory time to take off.

To deny officers the opportunity to take days off other than their normally scheduled days can only create situations detrimental to them and the citizens they serve.

It appears that, in our area, the Garcia decision is attempting to fix something that isn't broken. We do not have a full understanding of the entire problem, and based on that, we make the following suggestion.

Impose legislation which would exempt municipalities whose unions want compensatory time. Allow it to be a matter between the union and the municipality.

Respectfully,

Randy Orndorff
Randy Orndorff
President
Lodge #93

The Only National Police Fraternity - Established 1915 - Over 130,000 Members
The Philosophy of Law Enforcement is Prevention - Not Punishment

POLICE DEPARTMENT

OFFICE OF THE
CHIEF OF POLICE

600 CIVIC CENTER

TULSA, OKLAHOMA

74103

REACTION TO THE GARCIA DECISION

The Garcia Decision has the potential to do more harm to the Tulsa Police Department than any other court decision in history.

The elimination of compensatory time as an optional form of payment for overtime has the potential to cause us to lose the best and brightest of our young officers and, equally important, it may all but destroy our recruitment program.

Our department, like most police departments, bases most of its personnel assignments on seniority. Officers with the least seniority typically work evenings and nights. Officers with the most seniority typically work days. Within those shifts, officers with the most seniority usually have weekends or part of the weekend off. Those with less seniority end up with Tuesday and Wednesday, or Wednesday and Thursday off. It's an unpleasant arrangement for those who can't get weekends off (and on day shift, that includes 16 year veterans). But it's the fairest system yet devised and it's regarded as equitable by our officers.

The optional use of compensatory time allows those officers with limited seniority to accrue that time, if they so desire, and periodically use it to enjoy a "normal" day off.

We owe it to the citizens we protect to continue in our efforts to always recruit the most honorable, intelligent officers we can. But we're now going to have to tell these potential recruits that for years, except for their vacation, they will never have even one weekend day off. We'll have to tell them that in addition to their odd hours, they will have to

try to create or maintain a normal social life on Tuesday and Wednesday only. If they happen to have a family, we're going to have to tell them that for years, they'll never be able to take their spouse and children to a Saturday evening movie. They'll never be able to take a weekend trip. We'll have to tell them that the odds are against their being able to spend their child's birthday with them or being able to attend their child's school programs. We'll have to tell them that this court decision will deny them the privilege of enjoying all these things...and then we'll offer them the job. I doubt that we'll get many takers. And I'm not sure we would want anyone who would be willing to give up all those things.

And what of the officers already on our department? If you were a college educated professional, perhaps 24 or 25 years old, and were suddenly told that you would no longer be able to spend special occasions with your family or maintain even a semblance of normalcy in your personal life, what would you do? I predict that many, many of these officers will leave the department and find another profession. And I can't say that I blame them.

All people, particularly those in stressful occupations such as police work, must strike a healthy balance between their responsibility to their profession and their responsibility to themselves and their loved ones. Compensatory time permits officers to do that. It allows them to join in the mainstream of society and be a total member of their community.

Recruitment and retention problems are but two of the deleterious effects of this decision. I could speak for hours on the numerous ways it will cause curtailment in police services and increased costs for taxpayers.

This decision must be changed for the continued progress of law enforcement in the United States. I urge the Supreme Court and the Congress to reexamine and reconsider this decision and its ramifications. I encourage all citizens to join with us in seeking to bring about this change.

Thank you for this opportunity to speak to you today.

R. N. Dick, Chief of Police

PETITION

THE UNDERSIGNED CITIZENS PETITION THE MEMBERS OF CONGRESS AND ALL PUBLIC OFFICIALS TO TAKE IMMEDIATE ACTION TO OVERTURN THE LIMITING AND RESTRICTIVE INTERPRETATIONS OF THE SUPREME COURT DECISION STYLED: GARCIA VS. SAN ANTONIO.

WE SUBMIT THAT THE EMPLOYEES OF PUBLIC AGENCIES HAVE ENTERED INTO GOOD FAITH EMPLOYMENT CONTRACTS IN WHICH THEY ARE GRANTED THE RIGHT TO ELECT TO RECEIVE COMPENSATION FOR OVERTIME IN EITHER CASH OR "COMPENSATORY TIME", AND THEIR CONTRACT RIGHTS SHOULD BE RECOGNIZED AND PRESERVED.

FURTHER, YOUR PETITIONERS BELIEVE THAT THE CHAOS AND REDUCED PUBLIC SERVICES THAT WILL RESULT IN A BLANKET APPLICATION OF THE COURT'S RULING IS NOT IN THE PUBLIC INTEREST.

IT IS CLEAR, FOR EXAMPLE, THAT IF POLICE OFFICERS MUST BE PAID IN CASH FOR OVERTIME HOURS SPENT IN COURT THAT THERE WILL BE MANY CRIMINAL OFFENDERS AVOID PROSECUTION SIMPLY BECAUSE THE GOVERNING BODY DOES NOT HAVE SUFFICIENT PUBLIC FUNDS TO PROVIDE THE PRESENT LEVEL OF SERVICES IF THE ONLY METHOD OF COMPENSATION IS CASH PAYMENT FOR OVERTIME.

IN SHORT, STATE'S RIGHTS, THE FREEDOM OF CHOICE, THE RIGHT TO CONTRACT, AND THE PUBLIC INTEREST SHOULD BE PRESERVED BY IMMEDIATE ACTION TO REVERSE THE EFFECT OF THE INTERPRETATION OF GARCIA VS. SAN ANTONIO. THIS PETITION AND DUPLICATE COPIES THEREOF IS SIGNED FOR PRESENTATION TO ALL INTERESTED AND/OR INVOLVED PUBLIC OFFICIALS.

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<u>C. H. SEIFERT</u>	<u>2023 E 32ND ST B. ARROW.</u>
<u>B. A. LITTLE</u>	<u>5222 S ATLANTA PL TULSA</u>
<u>Harold Gillain</u>	<u>9602 N 110 E AVE</u>
<u>C. H. & J. H.</u>	<u>2023 S 51ST PL</u>
<u>Paul Lee</u>	<u>3804 S 132ND E. Ave TULSA,</u>
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<u>W. L. Jones</u>	<u>8105 E 93RD ST Tulsa OK 74133</u>

RESOLUTION

WHEREAS, the Oklahoma Sheriff's Association is an organization composed of the seventy-seven (77) County Sheriffs of the State of Oklahoma, and,

WHEREAS, the membership is vitally concerned with maintaining the public peace, protecting the rights of the citizens of the State of Oklahoma and enforcing the criminal law in their capacity of being the chief law enforcement officer in each county, and,

WHEREAS, the decision rendered by the United States Supreme Court in the case of Garcia v. San Antonio Metropolitan Transit Authority, has and will continue to have a severe impact upon the ability of the members of the Association from carrying out the duties and the responsibilities imposed upon them by their oath, and,

WHEREAS, said decision is causing a substantial and unwarranted burden to be placed on financial budgets of the 77 counties of this State, which are already suffering due to the economic climate, and,

WHEREAS, the Honorable United States Senator Don Nickles has introduced U.S. Senate Bill 1570, which would overturn those portions of the Garcia decision, which hold that State and local governments must comply with the Fair Labor Standards Act,

NOW, THEREFORE, BE IT RESOLVED that the Oklahoma Sheriff's Association urgently petitions the United States Committee on Labor and Human Resources to support and recommend to the United States Senate that Senate Bill 1570 be adopted and approved.

PASSED, APPROVED AND ADOPTED this 8th day of August, 1985,
at Oklahoma City, Oklahoma.

OKLAHOMA SHERIFF'S ASSOCIATION

BY: Jimmy L. Russell
President

ATTEST:

Secretary

(SEAL)

JCH:eas 8/23/85

Senator NICKLES. Do you have any idea how many people have signed the petition?

Mr. ORNDORFF. Well, this is just a copy of one petition, and I would estimate probably in the neighborhood of 400 names are on this particular petition. There are others being circulated.

Senator NICKLES. I believe all of you participated in the hearing that was held last week in Tulsa.

Approximately how many people were at that hearing?

Mr. CANTRELL. 125.

Senator NICKLES. 125.

Mr. Cantrell, you mentioned that most of the people there were in strong support of overturning the *Garcia* decision?

Mr. CANTRELL. It was 100 percent in favor of overturning.

Mr. ORNDORFF. Senator, I need to point out that 125 is representative of many, many more than just the actual number present in the room.

Senator NICKLES. I had a public meeting in Tulsa last week, and there were several people there representing the police force as well who mentioned their strong support, and said they wanted to have the option.

Mr. Orndorff and Mr. Gardner, as I understand your comments, the way you have it set up now the cities and the employees are happy. You have the option of comp time or overtime now, is that correct?

Mr. ORNDORFF. Senator, currently this decision is causing the slow erosion of what has been for several years now a real good working relationship between the police union and the government in Tulsa, and it is not their fault. And we realize that. But this decision is forcing us to file suits against them to force them to stop doing what this decision is making them do. There is nothing good coming from this that we can see.

Senator NICKLES. You have filed a suit to preserve comp time?

Mr. ORNDORFF. Yes, sir.

Senator NICKLES. It is interesting that you want back the option on the overtime. In many cases the State and local governments do not have the money to pay it in cash and it is a real challenge.

Basically what you are saying, Mr. Orndorff, is "If it ain't broke, don't fix it."

Mr. ORNDORFF. That is right.

Senator NICKLES. And you feel like they are breaking it?

Mr. ORNDORFF. They are trying to fix something that they should be leaving alone. We are happy where we are at.

Senator NICKLES. I also hear you saying something that I think makes a lot of sense as well.

You do not like the Supreme Court abrogating the contract that was entered into, negotiated and agreed upon, and one that happened to be working.

Mr. ORNDORFF. That is correct.

Mr. GARDNER. Senator, obviously none of the Supreme Court judges ever worked any shift time. We understand the kinds of problems that are involved in this.

Senator NICKLES. I understand your comment.

I think the need to get some time off should also apply to firemen and county people.

When you are dealing with a homicide investigation, or a nasty traffic accident, I personally think that the time off would be a healthy thing. It may be unhealthy not to have comp time. The same thing could apply to people involved in putting out a fire or cleaning up flood damage such as what you unfortunately had to do in Tulsa County recently. Most of our counties in Oklahoma have had those problems. Comp time would sometimes be the best solution for everybody concerned.

Again I do not really care if the cities want to go straight overtime. If they want comp time options, I think those are fine. I just have a real problem when the Federal Government comes in and prohibits it.

Mr. Cantrell, you mentioned in your present County Officers and Deputies Association of Oklahoma that many counties cannot afford to pay overtime and probably are not complying right now.

Mr. CANTRELL. They do not have the money. Our jury cut his workweek 112 man-hours as a result of this decision.

Senator NICKLES. I can see that there are some real litigation problems there.

Mr. CANTRELL. Yes.

Senator NICKLES. I hope that we can be successful before too long so that we do not see this thing end up in court over and over.

Mr. Gardner, you mentioned that it costs a quarter of a million dollars for the Tulsa fire department?

Mr. GARDNER. Yes, the fire department alone.

Senator NICKLES. How much would it be for the police?

Mr. GARDNER. Well, it would be somewhere around \$900,000, and then the additional costs making up our total of \$1,330,000 would be the other employees. But the majority of it is the police and fire. There would be \$1 million for the police and \$250,000 for the fire.

Senator NICKLES. One final question.

I think in the letter you read from the police chief, that he was talking about trying to work out a schedule. We need police officers on Saturdays and Sundays. We probably need more of them on Saturdays and weekends than any other day. I can see that they are going to want a 3-day weekend sometime to go to the lake or whatever. In order to have a weekend every once in awhile the comp time would help them out; if you were written on a schedule, it could really put a lot of binds and inconveniences on some employees as far as having that time off.

Mr. GARDNER. Yes.

Senator NICKLES. I appreciate your coming up today and for the hearing you had in Tulsa.

I see Joan Hasting is in the audience, and I appreciate your efforts on this as well. If individuals involved start understanding some of the ramifications of the act, it will certainly help correct it in Washington, DC.

Thank you very much.

On our next panel is Paul Abel, sheriff from Pottawatomie County Sheriff's Department; Ivan Simmons, president of the Association of County Commissioners of Oklahoma, and Rhonda Couch Swagerty from Tahlequah.

Mr. Abel.

**STATEMENT OF PAUL ABEL, SHERIFF, POTTAWATOMIE COUNTY
SHERIFF'S DEPARTMENT, SHAWNEE, OK; IVAN SIMMONS,
PRESIDENT, ASSOCIATION OF COUNTY COMMISSIONERS OF
OKLAHOMA, TEXHOMA, OK; RHONDA COUCH SWAGERTY,
SCHOOLBUS DRIVER, TAHLEQUAH, OK, ACCOMPANIED BY SUE
JENKINS, SCHOOLBUS DRIVER, TAHLEQUAH, OK**

Mr. ABEL. Senator, I want to express not only my thanks but the thanks of the Oklahoma Sheriff's Association for allowing us to talk with you this morning in reference to this.

The sheriffs of Oklahoma may not be in a unique situation, but a very critical situation. Cities are, more or less, confined to a small land mass and so forth. The average square mile per city in Oklahoma is from 6 to 1,200 square miles.

Now, as far as I know, probably two, maybe three sheriff's departments that this statement I am fixing to give you would not apply to the average size of the field staff, of the new sheriff's departments in Oklahoma, it is five to seven people. For instance, in Pottawatomie County we have just under 1,000 square miles to cover. I have five field deputies trying to cover that. You multiply that by 7 days a week, 24 hours a day, and you try to provide those 5 work that way.

We also have another problem with court papers that have to be served, transports that have to be made. These same people are having to do this. That is not to leave out the actual testimony and court time. In most counties, the deputies, deputy sheriffs live and work in districts, they take care of their district until *Garcia*.

Now they are having to work shifts. For instance, Wanette, OK, is in the southwest corner of my county. Then Centerview, OK, is in the far east corner of our county. The deputy from the Wanette area may be having to make a call in the Centerview area. The average response time up until *Garcia* was like 15 to 20 minutes, which in a county our size, that is not too bad. I wish it was better.

Since *Garcia*, our average response time has dropped to probably an hour-and-a-half to 2 hours, due to the fact that we just do not have anybody to go. With our officers out of town on transport picking up prisoners, serving court papers and so forth.

There are many times when we have one officer to cover that whole area from 2 a.m. until 6 to 8 a.m. Sometimes we do not have anybody, and I am not alone in this. There are 77 sheriff's departments and every one of them are understaffed, totally understaffed. Most of them have about the same amount of people they had back in the early thirties.

My county commission and excise supports says, flatly, they are not going to pay overtime. We are turning it in. This also puts the sheriffs themselves in a very precarious position. If we do not turn it in, we are liable. If we do turn it in, we are going to get sued, so either way you go, you are going to lose.

In my county we live between three correctional institutions. We have Joe Harp; we have Lexington Correctional Institution just to our west and south border; we have Boley over on the other side, and there are a couple in Oklahoma City. It seemed like most of the escapees that come out of the Joe Harp and Lexington end up in Pottawatomie County.

It is very hard to explain to the people that live in south Pottawatomie County why at the end of 8 hours I have got to pull my people off of a manhunt, when I have got two or three murderers loose down there. I do not think that is going to work.

Some lady calls me at 2 o'clock in the morning and says help me, he is trying to rape me, and I say lady, call me back after 8. I do not think that is going to work either.

We have got to have some help. It is just that simple. The Oklahoma Sheriff's Association met recently as the result of my conversation with you and your staff and Senator Boren's staff, and they came up with this resolution, which I would like to read to you, and also I believe you have been furnished copies of it.

Senator NICKLES. OK.

Mr. ABEL [reading].

Whereas, the Oklahoma Sheriff's Association is an organization composed of the 77 county sheriffs of the State of Oklahoma, and,

Whereas, the membership is vitally concerned with maintaining the public peace, protecting the rights of the citizens of the State of Oklahoma and enforcing the criminal law in their capacity of being the chief law enforcement officer in each county, and,

Whereas, the decision rendered by the U.S. Supreme Court in the case of Garcia versus San Antonio Metropolitan Transit Authority, has and will continue to have a severe impact upon the ability of the members of the association from carrying out the duties and the responsibilities imposed upon them by their oath, and,

Whereas, said decision is causing a substantial and unwarranted burden to be placed on financial budgets of the 77 counties of this State, which are already suffering due to the economic climate, and,

Whereas, the Honorable U.S. Senator Don Nickles has introduced U.S. Senate bill 1570, which would overturn those portions of the Garcia decision which hold that the Senate and local governments must comply with the Fair Labor Standards Act,

Now, therefore, be it resolved that the State of Oklahoma's Sheriff's Association urgently petitions the U.S. Senate Committee on Labor and Human Resources to support and recommend to the U.S. Senate that Senate bill 1570 be adopted and approved.

Passed, approved and adopted this 8th day of August, 1985, at Oklahoma City, OK. Signed by Larry L. Russell, president of Oklahoma's Sheriff's Association.

We do need the help. There is no question. Most of the budgets in Oklahoma are not increasing; they are being cut and I will give you one classic example. Right now, I had a mandate from the county excise board to cut our deputies. I only have five I do not think that is going to work, either. There is no way you can divide that number of people in this situation. We have to have help, Senator. We certainly appreciate your efforts.

It is hard to say when someone can have that comp time. In my department, anytime somebody wants off for some special occasion, we try and double up and give it to them, but as far as an hour-per-hour thing, it is almost an impossibility in my department. I think you will find that it is that way in almost all sheriff's departments in this State.

Senator NICKLES. Mr. Abel, thank you for your comments.

Mr. Simmons.

Mr. SIMMONS. Mr. Chairman, I wish to address problems and additional burdens the different segments of county government are experiencing by the Supreme Court's decision in the *Garcia v. San Antonio Metropolitan Transit Authority* which limits the number of hours State and local government employees may work and remove the use of compensatory time in lieu of overtime payment.

State and local governments are hard-pressed to have enough funds available to provide just the minimal services for their people without the added financial drain of paying overtime. If the decision made by the Supreme Court is to be complied by, it is estimated that 13 million State and local employees are affected at an annual cost running in the billions of dollars. This decision overturned a 1976 Supreme Court ruling, National League of Cities versus Usery, which exempted State and local governments from the FLSA overtime provisions in areas of "traditional government functions."

I wish to point out to this subcommittee how this decision will cause severe hardships for our local governments.

In the State of Oklahoma, there are 36 of the 77 counties with funds for road repair of less than \$1,000 per mile. Out-of-the-pocket expense cost to caliche or gravel a road runs approximately \$5,000 to \$6,000 a mile. To completely redo a paved road, the expense can run as high as \$100,000 per mile. To chip and seal, apply asphalt and rock, a paved road could cost \$8,000 or more per mile. Hot mix laid 2 inches thick costs in the neighborhood of \$60,000 a mile.

I have brought these figures to your attention to again emphasize that counties need all possible funds available just to provide minimal repair and maintenance for their roads. A large portion of moneys now available for such purposes would have to be used to pay employee overtime, and our transit system would continue to deteriorate. Much-needed improvements would not be financially possible.

In using average figures collected from counties at random over the State of Oklahoma, the cost of overtime could easily exceed \$6 million. These figures allude to county road employees only and would be multiplied many times over if all county functions were included.

The counties of Oklahoma have over 80,000 miles of county road to maintain with \$106 million to do so. The total economy depends on our local access of roads and streets. We all know too well that land without access is land without value. It is necessary to note at this time that America runs on local roads.

Mother Nature is no respecter of a 40-hour workweek. During blizzard conditions, many county road employees are needed to work long hours to keep roads open. Emergencies can and do occur during these times, such as childbirth or illness which require medical attention or immediate hospitalization. Schoolbus routes and mail routes must be cleared and passable.

In the western part of Oklahoma, howling snowstorms can completely close highways and roads making them impassable in just a matter of a few hours. Flooding occurs statewide and particularly in the eastern part of Oklahoma, washing out bridges and roads, cutting off the arteries of travel.

Local governments simply do not have the funds available to pay overtime, and without the flexibility of comp time, employees who have already completed a 40-hour workweek would not be allowed to continue working even during times of disaster caused by the weather.

Employees are many times faced with forgoing work because it would necessitate working overtime and leave road conditions

unsafe to the traveling public. For example, a road crew is assigned to install road culverts some 30 miles or more from the county shop. Many times this type of job cannot be completed within the allotted time because of equipment failure or other unforeseen delays but could be with an additional hour or two. The job could be concluded without the expense of returning men and equipment to the distant work location if compensatory time were allowed.

During summer months when weather is most suited for maintenance of paved roads, longer hours allowing for jobs to be completed would be advantageous to the traveling public and a savings of county road funds on jobs such as chip and sealing. There is less danger to the traveling public when these jobs are concluded in the least time possible. Also, a load of oil must be used within a certain time and the correct temperature maintained. The weather is a factor to be considered. Many types of road repair must be done when the conditions are favorable or it is not successful.

The county clerk's office has an increased workload at the end of the fiscal year. Allowing compensatory time for employees would enable more timely completion of this work. A large volume of work is brought into this office at the last minute. This work must be timed and dated, the fee collected and receipted. Whenever errors are made and cash does not balance, it is necessary to find that mistake. By statute, the cash from the prior day must be deposited by the following day. There is not time to search out the error and complete the regular daily work during a regular schedule.

The FLSA is not advantageous to the court clerk's office and creates a hardship for the clerk and the employees. Logging time sheets for each employee takes valuable time that could be used for other purposes. Many times the court clerk's office is holding jury in two or more courtrooms which requires a deputy clerk to sit in on the cases. This schedule starts early in the morning and can run late into the evening. At other times, employees from this office are ordered by the court to assist with hearings on Saturday.

The county sheriff's office will be greatly affected by this decision. A schedule for each deputy's 28-day work period is made. This employee must not work over 8 hours per day and must stagger his/her days off to prevent having all deputies off duty at the same time. Once the schedule is made out, it cannot be changed. When compensatory time was allowed, it saved the sheriff's office money, made their time more flexible and allowed deputies to be called if there was an emergency. Oklahoma statutes do not allow for over-time payment. Many times assistance will not be available for local residents even in cases of emergencies under the present decision.

I believe that it would be beneficial to both the employees and the taxpayers to implement a compensatory system whereby employees are allowed comp days off in the place of mandatory over-time pay. The employee would benefit as he/she could accumulate days to use at a time when the work load is lessened to conduct personal business. The taxpayers would benefit because of the increased and more efficient service provided, and the county would be able to more effectively manage time and manpower.

Most county employees definitely favor the compensatory time and have come out in support of that system. Texas County em-

ployees of district No. 3 were polled on August 21, and of the 22 employees present, all voted in favor of restoring the comp time in lieu of overtime pay. Five of these employees have written letters stating their feelings in this matter. These letters are attached to this testimony for your consideration. I would like to briefly refer to a couple of portions of those letters. They are a part of this testimony. The letters are from Mike Beck and Frank Boothby.

Dear Senator: I believe the county roads are a "lifeline" for the urban people, and I believe that proper maintenance of these roads is very important. This is the reason I am writing this letter to let you know about my feelings regarding the recent Supreme Court's decision regarding the Fair Labor Standards Act.

I have been employed by the county for seven years, and I am proud of my contribution to the well-being of the people we serve. It is important that we keep the roads open during the rains and the snows, which do not always occur within the 40-hour work week. In my experience it has been necessary during bad weather to work for 10 days straight, 15 hours per day, just to allow the critical and necessary traffic to continue. With the current ruling, we would not be allowed to perform this kind of service to these people and serious consequences could result.

I have five different letters, Senator, but I am just going to refer in the essence of time. The next letter is from Mike Beck.

Dear Senator: I have been employed as a county employee for approximately 23 years, and the opinion which I express is based on my first-hand knowledge and experience. I feel that the present ruling will have repercussions which will cause unnecessary disruption to the services which we now provide for the public and the safety of the same will not be maintained at a desirable level.

Due to the increased financial burden, counties cannot pay overtime and the employees must consequently not work overtime even when the situation clearly calls for additional time. Snows and rains do not conveniently happen just during a 40-hour time period. It has been my experience that overtime becomes necessary in order to clear roads so people can feed their cattle and oilfield equipment can get through to continue with their work. I have approximately 104 miles of roads to maintain, and school buses, as well as mail carriers, must have access irregardless of the work schedule. The elderly urban people must also have the roads to enable them to get to town in the event of ill health or other needs.

In summary, we urge the Congress to pass legislation such as Senate bill 1570 that would in effect negate the Supreme Court's decision. If it is not repealed, the efficiency of county government will be greatly hampered. To allow compensatory time to be utilized by our employees is essential to provide services to our people, and the only practical and reasonable solution to solving many of the problems so stated.

On behalf of the county officials of Oklahoma, I want to express our appreciation to you for your concern and efforts in this matter. We respectfully request that this entire testimony be entered in the records of this hearing.

Thank you sir.

Senator NICKLES. Thank you. We will be happy to. I think those letters make a very good point, and I appreciate it.

[The prepared statement of Mr. Simmons and the letters referred to follow:]

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LABOR SUBCOMMITTEE HEARING on S. 1570

Ivan Simmons, President

Association of County Commissioners of Oklahoma

Mr. Chairman, I wish to address problems and additional burdens the different segments of county government are experiencing by the Supreme Court's decision in the Garcia v. San Antonio Metropolitan Transit Authority which limits the number of hours state and local government employees may work and remove the use of compensatory time in lieu of overtime payment.

State and local governments are hard pressed to have enough funds available to provide just the minimal services for their people without the added financial drain of paying overtime. If the decision made by the Supreme Court is to be complied by, it is estimated that 13 million state and local employees are affected at an annual cost running in the billions of dollars. This decision overturned a 1976 Supreme Court ruling, National League of Cities v. Usery, which exempted state and local governments from the FLSA overtime provisions in areas

of "traditional government functions".

All county employees, with the exception of elected officials and their personal staff members, executive employees, administrative employees, professional employees and certain seasonal employees, are subject to both the minimum wage provisions and the overtime provisions of the FLSA. All such employees must be compensated on the basis of time-and-a-half the employee's regular pay for all overtime hours worked. A 40 hour workweek is the statutory standard and all county employees must be paid time-and-a-half for all hours in excess of 40 worked in any seven consecutive day work period.

I wish to point out to this Subcommittee how this decision will cause severe hardships for our local governments.

In the state of Oklahoma there are thirty-six (36) of the seventy-seven (77) counties with funds for road repair of less than \$1,000 per mile. Out of the pocket expense cost to caliche or gravel a road runs approximately \$5,000 to \$6,000 a mile. To completely redo a paved road, the expense can run as high as \$100,000 per mile. To Chip and Seal (apply asphalt and rock) a paved road could cost \$8,000 or more per mile. Hot mix laid two inches thick costs in the neighborhood of \$60,000 a mile. I have brought these figures to your attention to again emphasize

that counties need all possible funds available just to provide minimal repair and maintenance for their roads. A large portion of monies now available for such purposes would have to be used to pay employee overtime and our transit system would continue to deteriorate. Much needed improvements would not be financially possible.

In using average figures collected from counties at random over the state of Oklahoma, the cost of overtime could easily exceed six million dollars. These figures allude to county road employees only and would be multiplied many times over if all county functions were included.

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Employees are many times faced with foregoing work because it would necessitate working overtime and leave road conditions unsafe to the traveling public. For example, a road crew is assigned to install road culverts some thirty miles or more from the county shop. Many times this type of job cannot be completed within the allotted time because of equipment failure or other unforeseen delays but could be with an additional hour or two. The job could be concluded without the expense of returning men and equipment to the distant work location if compensatory time were allowed.

[4]

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The FLSA is not advantageous to the Court Clerk's office and creates a hardship for the Clerk and the employees. Logging

time sheets for each employee takes valuable time that could be used for other purposes. Many times, the Court Clerk's office is holding jury in two or more courtrooms which requires a Deputy Clerk to set in on the cases. This schedule starts early in the morning and can run late into the evening. At other times, employees from this office are ordered by the Court to assist with hearings on Saturday. (See attached letter from the Court Clerk of Texas County.)

The County Sheriff's office will be greatly affected by this decision. A schedule for each deputy's 28-day work period is made. This employee must not work over eight hours per day and must stagger his/her days off to prevent having all deputies off duty at the same time. Once the schedule is made out, it cannot be changed. When compensatory time was allowed it saved the sheriff's office money, made their time more flexible and allowed deputies to be called if there was an emergency. Oklahoma statutes do not allow for overtime payment. Many times assistance will not be available for local residents even in cases of emergencies under the present decision.

I believe that it would be beneficial to both the employees and the taxpayers to implement a compensatory system whereby employees are allowed comp days off in the place of mandatory overtime pay. The employee would benefit as he/she could ac-

cumulate days to use at a time when the workload is lessened to conduct personal business. The taxpayers would benefit because of the increased and more efficient service provided and the county would be able to more effectively manage time and manpower. Most county employees definitely favor the compensatory time and have come out in support of that system. Texas County employees of District #3 were polled on August 21, and of the twenty-two employees present all voted in favor of restoring the "comp" time in lieu of overtime pay. Five of these employees have written letters stating their feelings in this matter. These letters are attached to this testimony for your consideration. The financial impact on state and local governments will be staggering and we can only imagine what lies beneath the tip of the iceberg. The requirements of the FLSA for additional recordkeeping and reporting will add more work on already overworked employees who could be using their time in a more effective manner. There has been an alarming increase in the number and amounts of judgements against state and local governments in the federal civil rights and the tort areas. This will be increased without the ability to address the community needs in a timely manner.

In summary, we urge the Congress to pass legislation such as Senate Bill 1570 that would in effect negate the Supreme Court's decision. If it is not repealed, the efficiency of county

government will be greatly hampered. To allow compensatory time to be utilized by our employees is essential to provide services to our people and the only practical and reasonable solution to solving many of the problems so stated.

On behalf of the county officials of Oklahoma, I want to express our appreciation to you for your concern and efforts in this matter. Thank you.

LINDA BOWMAN
COUNTY CLERK OF TEXAS COUNTY

P. O. Box 197
GUYMON, OKLAHOMA 73942
August 20, 1985

EFFECTS OF OVERTIME REQUIREMENTS ON THE TEXAS COUNTY CLERK'S OFFICE

Texas County Oklahoma officers do not have adequate funding to pay overtime.

At the end of the fiscal year, nearly every employee has an increased work load. Working overtime would enable more timely completion of the work.

When increases in fees occur, at the end of the year, at other selected times many customers bring large volumes of work at the last minute. At the very least these must be timed and dated, the fee collected and receipted.

Whenever there are errors made and cash does not balance, it is necessary to stay late or start the next day with the error. By statute the cash from the prior day must be deposited the following day. We do not have time to search out errors and complete the regular daily work during a regular schedule.

We do not often need to work overtime. If overtime is needed almost without exception, the peak period will last for two or three weeks and the work load will level out. It would benefit both the employee and employer if scheduling could be worked out later than the forty hour work week. I would prefer by the end of the next pay period which would be the end of the next month.

Many of my employees at times must take care of personal business during regular working hours. It would be to their benefit if they could trade their overtime accrued for the time that they need for personal use.

Linda Bowman
Linda Bowman

HERB STANDEVEN, ASSOCIATE DISTRICT JUDGE

FRANK OGDEN, DISTRICT JUDGE

OFFICE OF

Court Clerk of Texas County

TWILA FENTON, COURT CLERK

P. O. BOX 1081 • PH. 405 338 3003

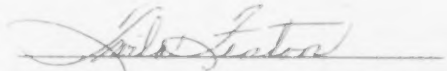
Guyman, Oklahoma 73942

TO WHOM IT MAY CONCERN:

RE: WAGE & HOUR LAW

Listed below are reasons I do not think the Wage & Hour Law benefits my office. To me it makes a hardship on all employees:

1. Logging time sheets for each employee takes up their time and mine, which time could be used for work.
2. Keeping records of time sheets & taking copies to County Clerk's Office is double work for the County Clerk's. Requires more filing space for their office and mine.
3. Also, at times we are holding jury in two (2) Court rooms, and I am in need of a Deputy clerk to set in on cases. Some times we start early in the morning, and stay late at night. This occurs about 5 to 6 times a year, not counting the days we are in jury session. Also, sometimes we are ordered by the Court to come down on Saturday's for hearings.
4. I would like to see the employees be able to work these extra hours without pay, and be compensated for extra days off.



- Twila Fenton, District Court Clerk
of Texas County, Guyman, Okla. 73942

AUGUST 21, 1985

SENATOR DON NICKLES
CHAIRMAN, SENATE LABOR SUBCOMMITTEE
HART SENATE OFFICE BUILDING
WASHINGTON, D.C.

Dear Senator:

I am writing this letter as a means of expressing my opinion regarding the recent Supreme Court's Decision regarding the Fair Labor Standards Act.

I have been employed as a County employee for approximately 23 years and the opinion which I express is based on my first hand knowledge and experience. I feel that the present ruling will have repercussions which will cause unnecessary disruption to the services which we now provide for the public and the safety of the same will not be maintained at a desirable level.

Due to the increased financial burden; counties cannot pay overtime and the employees must consequently not work overtime even when the situation clearly calls for additional time. Snows and rains do not conveniently happen just during a 40 hour time period. It has been my experience that overtime becomes necessary in order to clear roads so people can feed their cattle and oilfield equipment can get through to continue with their work. I have approximately 104 miles of roads to maintain and school buses, as well as mail carriers must have access irregardless of the work schedule. The elderly urban people must also have the roads to enable them to get to town in the event of ill health or other needs.

This ruling could cause an employee to abandon equipment in undesirable locations if a blow-out or other maintenance work became necessary at a time which would cause him to work overtime in order to repair the equipment. Because of the distance that must be traveled to and from job locations, it becomes impractical and inefficient to make unnecessary trips just to stay within an inflexible time frame.

Page # 2

It is necessary to work the roads when the results are most beneficial --not three or four days later when the roadway has become dry and the ruts have been made (deep and wide). If the rain should happen at the end of a 40 hour time period, the delay could cost a great deal more to repair than to maintain.

I am of the opinion that it would be beneficial to both the employees and the taxpayers to implement a compensatory system whereby employees are allowed compensatory days off in the place of mandatory nonacceptable overtime pay. The employee would benefit as he could accumulate days to use at a time when the workload is lessened and when the employee could benefit more from it. The taxpayers would benefit because of the increased and better service provided. The County would also benefit because it would be able to more effectively manage time and manpower.

I definitely support the "Comp" plan and believe it is a sensible solution to the problem as it now exists.

Sincerely,

A handwritten signature in cursive script that reads "Mike Beck".

Mike Beck

AUGUST 21, 1985

SENATOR DON NICKLES
CHAIRMAN, SENATE LABOR SUBCOMMITTEE
HART SENATE OFFICE BUILDING
WASHINGTON, D.C.

Dear Senator:

I believe the County Roads are a "Life-Line" for the urban people and I believe that proper maintenance of these roads is very important. This is the reason I am writing this letter to let you know about my feelings regarding the recent Supreme Court's Decision regarding the Fair Labor Standards Act.

I have been employed by the County for 7 years and I am proud of my contribution to the well being of the people we serve. It is important that we keep the roads open during the rains and the snows, which don't always occur within the 40 hour work week. In my experience it has been necessary during bad weather to work for 10 days straight - 15 hours per day, just to allow the critical and necessary traffic to continue. With the current ruling we would not be allowed to perform this kind of service to these people and serious consequences could result.

Our countryside is such; that strong winds and flat country can cause a great deal of drifting and impassable conditions. Our entire economy is directly and indirectly dependent on agriculture and oil production. If the feedyards or farmers are unable to feed their cattle, extreme losses can occur. The drillers and oilfield crews must have access to transport the oil and by-products.

The increased financial burden that has been placed on the Counties means that we the employees can't work overtime even if the situation requires it. I believe that the present ruling will cause unnecessary interruptions to the service we provide to the people of our community.

There have been circumstances where we have played an important role in assisting these persons in emergencies which extended our worktime beyond the 40 hour work week. I want the opportunity of continuing this kind of service, therefore I support

the implementation of a compensatory work system whereby we can work on a more flexible schedule and we the employees would be compensated for our overtime in a way that would benefit us.

I want you to know I support the "Comp" plan and believe it is a right solution to our needs and those which we are serving.

Sincerely,

Frank Boothby
Frank Boothby

August 21, 1985

SENATOR DON NICKLES
CHAIRMAN, SENATE LABOR SUBCOMMITTEE
HART SENATE OFFICE BUILDING
WASHINGTON, D.C.

Dear Senator;

I want to express my opinion about the recent ruling handed down by the Supreme Court in regard to the Fair Labor Standards Act and I chose to write this letter as a means of telling you how this will effect we, the employees and all the other taxpayers.

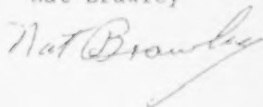
Counties are not authorized to pay overtime and we therefore are not allowed to work on any kind of a flexible schedule suited for the circumstances which might arise. A forty hour week does not allow any variance for rains or snows or other irregular maintenance. The emergencies often time occur after we have put in the 40 hours, and to not have the flexibility to be able to work when the need arises is ridiculous. I believe strongly that a rigid 40 hour week will cause unnecessary hardships on many of the urban people in this district.

I believe that we employees would benefit from a compensatory work plan and the taxpayers would benefit because of the continued good service and availability of County employees when the need arises.

I support a "Comp" Plan and hope that it can be implemented for the good of all concerned.

Sincerely,

Nat Brawley



August 21, 1985

SENATOR DON NICKLES
CHAIRMAN, SENATE LABOR SUBCOMMITTEE
HART SENATE OFFICE BUILDING
WASHINGTON, D.C.

Dear Senator;

I want you to know how I feel about the recent Supreme Court ruling on the Fair Labor Standards Act.

I have been employed by the County for approximately 7 years and I think that it is important that we are allowed to work under a compensatory work schedule.

The Counties have no authority to pay overtime and we are consequently not allowed to work any overtime, even if the circumstances warrant additional time to complete a job or clear the roads for necessary travel.

There are numerous miles of country roads and a great percentage of the population served by these roads. A person has to travel a considerable distance to get to a Doctor, buy groceries and attend to business in this district, and if these roads are not open to traffic because of rains or snows or lack of maintenance these people are isolated and unable to function as they need to. All caused unnecessarily because the service can't be provided for them because it would entail overtime work.

I believe that unnecessary interruptions and lack of service will hurt both the economy and the well-being of the people in this district.

I am in favor of a compensatory work schedule, whereby we are allowed the opportunity of providing the right kind of service when and where it is needed and we are compensated with days off to use as time is conveniently available.

I am completely supportive of the "Comp" work schedule.

Sincerely,

Molly Huddleston
MOLLY HUDDLESTON

August 21, 1985

SENATOR DON NICKLES
CHAIRMAN, SENATE LABOR SUBCOMMITTEE
HART SENATE OFFICE BUILDING
WASHINGTON, D.C.

Dear Senator;

I am writing this letter as a means of telling you about my viewpoint in regard to the recent Supreme Court's Decision on the Fair Labor Standards Act.

I have worked for the County approximately 18 years and I feel that this ruling is not beneficial to us (the employees) or to the County. The present ruling would cause unnecessary delays in doing the work as well as cutting down on the standards of safety that we could provide.

Counties cannot pay overtime and the employees must not work overtime, even when the situation clearly calls for additional time. There are many miles of country roads and these roads are necessary for the existence of many families. Winter times can be severe and without the proper maintenance, these people will be isolated from medical care as well as food and other necessities.

The rains in the summer and spring can cause wash-outs which create hazards and danger to anyone who needs to travel on these roads. The emergencies often occur at times which don't fit into a 40 hour work week.

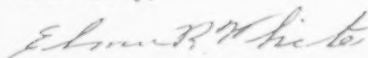
I believe strongly that unnecessary interruptions will only cost the county more money and consequently provide less service for the Taxpayers dollars. This ruling will in-fact cause greater inefficiency and a lesser degree of compliance with the needs of all the urban people which live in this district.

I believe that a compensatory work system would allow us the opportunity of accumulating days to spend at a time which is feasible for both the County and the employee. The taxpayers would benefit from the increased and better service provided.

It is necessary to adjust the work to the job and not the job to an inflexible work schedule.

I definitely support the "Comp" plan and hope it will be implemented.

Sincerely,



Elmer White

The Honorable Senator Don Nickles
3003 Federal Building
333 West 4th
Tulsa, OK 74103

August 23, 1985

Dear Senator Nickles:

In speaking with you yesterday, August 22, 1985, while you were in Tahlequah, I want to express my sincere gratitude on the proposal which you have brought forth to allow employers the right to give their employees the choice to choose between overtime pay or compensatory time off.

We supposedly live in a democracy where we, the people, have freedoms of choice. These choices have been stripped from the people by the Supreme Court. The Preamble itself states that "We the people of the United States", not the Supreme Court, "established the Constitution to create a more perfect union, promote the general welfare and secure the blessing of liberty to ourselves and our posterity".

I have been working for Tahlequah Public Schools for four years in the capacity of secretary at the Senior High School while also driving a school bus in the mornings and afternoons. With the passing of this new law, I have had to give up my bus driving job. In monetary terms I am talking about a \$300.00 a month cut in pay. This is the difference between being on welfare or not.

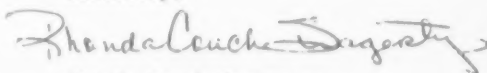
As a single parent, with two small children, ages eight and two, the law is giving me no other choice but to become dependent on our state government.

I could probably find a second job working elsewhere but this would mean working at night and on weekends, finding and paying another babysitter, and most of all, more time away from my children. Before, my children were left with a babysitter at 7:00 a.m. and picked up by 5:00 p.m., leaving my evenings and weekends free to be with them, no extra cost was incurred on my daycare and I was not on welfare.

I am not asking for overtime pay or compensatory time off, only the right to work both jobs for the same employer if I so desire.

Thank you for your time and attention.

Sincerely,



Rhonda Couch Swagerty
P. O. Box 594
Tahlequah, OK 74464

The Honorable Senator Don Nickles
 3003 Federal Building
 333 West 4th
 Tulsa, OK 74103

August 26, 1985

Dear Sir:

We the employees of Tahlequah Public School, in the capacity of bus drivers and mechanics, would like to make you aware of the problems we are about to be faced with in this upcoming school year. We do not feel you fully understand what you are asking us to do.

As each school year begins we are issued time sheets, bus rosters, and a code of conduct which will need to be followed. At the end of the meeting we are then responsible for the care and upkeep of our bus, to make sure when something is wrong it is turned into the mechanics to be fixed.

How can we run a tight ship if, for instance, one of our busses breaks down at 4:30 P.M., thirty miles out in the country? By the time the mechanics reach the stranded bus, with the wrecker and a relief bus the time would be about 5:00 or 5:30 P.M. With the new law the driver would not be allowed to finish his/her route. A substitute would be placed in to take, possibly a dozen or more, frightened students into their care. Then there is also the possibility that the substitute may not know the route. The mechanic in turn can not be paid for time

spent out in the field so a substitute would have to be hired. Also all of our mechanics are certified bus drivers but with this new law they can no longer drive as a substitute in the case of an emergency such as sickness or a family matter.

Tahlequah is predominately a transportation area school so there are 3200 students and approximately 2200 miles, a day of bus travel involved in this situation.

On the subject of school activities, schools will now have to hire someone to take these extra trips instead of an experienced driver. They will be driving our busses, which we are responsible for, after hours and late at night. We have also found that substitutes, most of the time, do not take the best care of our busses. Who is going to be blamed, the driver who drives five days a week or the driver who only drives to a Friday night ballgame?

The welfare and safety of our passengers is our only concern and what ever time it takes is all part of the job.

Thank you for your time and attention.

Tahlequah Public School Bus Drivers
P.O. Box 517
Tahlequah, OK 74465

Senator NICKLES. Do some of the counties pay overtime or do all of them? Is the predominant practice comp time?

The Tulsa police force offers the option, which seems to be, as far as the employee is concerned, the best thing that could happen with most of the county.

Mr. SIMMONS. Yes, I would say that is prevalent. Most of the counties have offered compensatory time even prior to this decision, and that has made their work schedule flexible and can meet needs. I know of only one county that paid overtime as a normal practice or everyday practice.

Senator NICKLES. You mentioned the Panhandle of Texas. The county of Cimarron, and some of the other counties in that area, where you had snowstorms come in almost overnight, and block up the main roads. Crews would have to work overtime to get the roads cleared.

Sheriff Abel, you mentioned a manhunt. Unfortunately we have had many of our county officers involved in this in different areas across the state. That takes a lot of long hours. Right now, let us say, you are involved in a manhunt and somebody goes out and spends about 3 straight days trying to chase somebody down and might only get a couple hours of sleep, if any at all. They need that time off, do they not?

Mr. ABEL. Yes, sir. Yes, they do. Of course, over the years we have always tried to give them the time off as we could. Right now, there is no way we can give you an average. It appears even on a slow month that the average deputy sheriff would put in between 120 and 130 hours extra. If you count that up, that is a lot of overtime. I am talking about the smaller departments where you just do not have anybody out there. Their average is 16, 18 hours a day out there. That is a fact. I do not know how you can put it. That is not getting it.

Senator NICKLES. Mr. Simmons, you mentioned you have to build roads when the weather is right. You have to repair the roads when the weather demands it; from floods, snow, and so on. Those activities by their very nature dictate unusual work levels.

Most of the counties are offering comp time. In some cases, they cannot even pay the comp time or get the time off, but most of the counties, as far as the road maintenance crews and so on, do work those extra hours. Are they able to accumulate those days off for hunting season or other things they can work in with their schedule?

Mr. SIMMONS. Yes, sir. I think that most counties have been giving compensatory time, those times—they could take with the approval of officer in charge, of course, considering the work schedule and the urgency of the work schedule to meet their personal needs, whether it be to spend time with families or go hunting or whatever, or just to do personal business. I think that it might be noted too; that even though we haven't had the extremely wet weather—we do occasionally get an inch or two—even in the panhandle—and when we do have a good rain and roads are rutted, then it is very necessary to tend to that in a short frame of time. In other words, you have to wait until it is dry enough, yet you cannot wait too long or it gets too dry to work properly.

In Texas County, our road maintenance people have about a hundred miles of road to cover per man. If we have a rain and the roads are rutted, then the best use of time and equipment must be utilized to get the work done that needs to be done when the soil is of the right moisture, so that it will not rerut and so it will smooth out and pack ruts that have already been made.

Senator NICKLES. Thank you very much.

Our next panel members are Rhonda Swagerty and Sue Jenkins. I had the pleasure of running into these two ladies in Tahlequah, OK, and I can tell you they brought up a point that I had not thought of, as far as implications of this act. Rhonda, would you care to share that with us?

Ms. SWAGERTY. In speaking with you on August 22, 1985, while you were in Tahlequah, I want to express my sincere gratitude on the proposal which you have brought forth to allow employers the right to give their employees the choice to choose between overtime pay or compensatory time off.

We supposedly live in a democracy where we, the people, have the freedom of choice. These choices have been stripped from the people by the Supreme Court. The preamble itself states that, "We the people of the United States," not the Supreme Court, "established the Constitution to create a more perfect union, promote the general welfare and secure the blessing of liberty to ourselves and our posterity."

I have been working for Tahlequah public schools for 4 years in the capacity of secretary at the senior high school while also driving a school bus in the mornings and afternoons. With the passing of this new law, I have had to give up my bus driving job. In monetary terms I am talking about a \$300 a month cut in pay. This is the difference between being on welfare or not.

As a single parent with two small children, ages 8 and 2, the law is giving me no other choice but to become dependent on our State government.

I could probably find a second job working elsewhere, but this would mean working at night and on weekends, finding and paying another babysitter, and most of all, more time away from my children. Before, my children were left with a babysitter at 7 a.m. and picked up by 5 p.m., leaving my evenings and weekends free to be with them. No extra cost was incurred on my day care and I was not on welfare.

I am not asking for overtime pay or compensatory time off, only the right to work both jobs for the same employer if I so desire. My employer cannot pay overtime, and with the bus driving being just a 9-month job, there is no sense in having comp time. Later we have 3 months in the summer for comp time.

Senator NICKLES. You are working for the Tahlequah public school system?

Ms. SWAGERTY. Yes, sir.

Senator NICKLES. And you worked 3 years as a secretary?

Ms. SWAGERTY. No. Four.

Senator NICKLES. You have also worked in the bus driving job to supplement your pay, to help take care of your two children?

Ms. SWAGERTY. Yes, sir.

Senator NICKLES. You would run the bus route, work as a secretary, and run the bus route in the afternoon?

Ms. SWAGERTY. Right.

Senator NICKLES. That fit in very well with the scheduling of your personal time, but now this *Garcia* thing comes out and the school system says, "wait a minute, we have to pay you overtime. They figure out what your salary is or your hourly wage as a secretary is, and then say, Oh, wait a minute, we cannot pay you time-and-a-half for your bus driving. Therefore, you lose that \$300 a month extra job because they say they cannot pay the time-and-a-half because they are, like most school districts, strapped for funds as well.

Ms. SWAGERTY. Not only that, most bus drivers in Tahlequah make over \$5 an hour. Another job in Tahlequah would only pay minimum wage.

Senator NICKLES. Some people would say *Garcia* is trying to help, but it really would be hurting you because you will lose your bus driving job. And if you found a supplemental job, it would probably be \$3.35 or something like that?

Ms. SWAGERTY. Right.

Senator NICKLES. The status is that school has started.

Ms. SWAGERTY. Started Monday the 26th.

Senator NICKLES. And you lost your extra job?

Ms. SWAGERTY. Yes. Yes, sir.

Senator NICKLES. Somebody has taken that?

Ms. SWAGERTY. Well, we were given the choice. There are four drivers involved in this, and we were given the choice of which we would rather have. I could have probably driven the bus longer hours, but it would mean leaving the house at a quarter to 5 in the morning. Tahlequah is mainly a transportation area school, and we have kids getting on the buses at 5 in the morning so they can be at school by 8:30. I could do that choice, but there again, I would have trouble with the babysitter and whether it would be more feasible.

Senator NICKLES. You were given your choice of jobs. You could have been a bus driver or could have been the secretary of the school system?

Ms. SWAGERTY. Yes, sir.

Senator NICKLES. Sue Jenkins, do you have the same story?

Ms. JENKINS. I work with the EMH kids. I work with the EMH kids during the day driving them to their jobs and to the guidance center and both—just wherever they needed to go. I had my choice of this route or my regular route, and I took my regular route because it was an hour-and-a-half more a day and that way I can drive my bus home.

Now I have to leave my car at the bus lot so I have some way home. I live 20 miles out in the country and now I have to drive back and forth, which is an extra expense and really has cost me about \$400 a month.

Senator NICKLES. Is that right?

Ms. JENKINS. Yes, sir.

Senator NICKLES. Do you also work for the school system?

Ms. JENKINS. Yes.

Senator NICKLES. Besides the bus?

Ms. JENKINS. I do two bus jobs. I have a regular route and then I drive all during the day for the EMH students.

Senator NICKLES. I see. They gave you the option that you either take the regular bus route or you take your job where you are driving the EMH bus. What does EMH stand for?

Ms. JENKINS. Multiple handicaps. Enducable mentally handicapped.

Senator NICKLES. You've had to give up one of your jobs as a result of this rule? You did not want to give up either one of them?

Ms. JENKINS. I cannot afford to, really. I did not have any choice.

Senator NICKLES. Your situation is the same as Rhonda's? Rhonda, you did not want to give up either one of these jobs, but because of this ruling the school was telling you that you had to pick between one or the other?

Ms. SWAGERTY. Yes, sir.

Senator NICKLES. I appreciate your comments, because this is a different slant on the entire matter than we heard from the counties, the sheriffs and the police, et cetera.

I think the ramifications of this thing go a lot deeper when you really look at it, and the impact again can be very, very detrimental. This has complicated many people's lives, and in some cases put people on welfare that did not want to be, and did not have to be.

You have a real challenge before you, being a single parent with two children. You certainly do not need the Supreme Court interfering in the success that you have had in the past.

I appreciate your statement before the committee. Thank you very much. Thank you all.

On the next panel are Steven Lewis, director of the Oklahoma Department of Wildlife Conservation, and Capt. Larry Owen, administrative assistant to Commissioner Reed, Oklahoma Department of Public Safety.

Mr. Lewis, would you care to be first?

STATEMENT OF STEVEN A. LEWIS, DIRECTOR, OKLAHOMA DEPARTMENT OF WILDLIFE CONSERVATION; OKLAHOMA CITY, OK; AND CAPT. LARRY OWEN, ADMINISTRATIVE ASSISTANT TO COMMISSIONER REED, OKLAHOMA DPS; OKLAHOMA CITY, OK

Mr. LEWIS. Thank you, Senator Nickles.

It is a pleasure to personally appear before you and provide testimony on impacts of the *Garcia* decision on the ability of the Oklahoma Department of Wildlife Conservation to meet its management and protection responsibilities.

The *Garcia* decision has reduced the Oklahoma Department of Wildlife Conservation's ability to manage and protect entrusted State resources.

The impact of the decision is a loss of flexibility to meet seasonal work peaks and not a reduction in the total annual work effort. The Oklahoma Department of Wildlife Conservation does not have the funds to pay overtime and therefore cannot allow any employee to work over 40 hours per week. The department is on a fixed income derived from license sales and does not receive supplemental general revenue appropriations.

The Oklahoma Department of Wildlife Conservation must then end employees' workweek when a total of 40 hours are accumulated. This means the end of a particular management or enforcement effort for that week. Examples of specific impacts are outlined for specific divisions below.

ENFORCEMENT

Wildlife law enforcement is very unique in the field of law enforcement. In most instances, one officer is responsible for all wildlife enforcement and other relations in an entire county.

Since the *Garcia* decision mandates that comp time cannot be saved over several months for later use and the department cannot afford overtime, each officer has been restricted to 171 hours in a 28-day period with no variance.

The end result has been and will continue to be that during the traditional fall hunting seasons, dove, archery deer, primitive deer, quail, turkey, waterfowl, et cetera, our officers will be unable to properly check hunters, enforce the laws, and assist landowners with hunting-related problems. Enforcement of fishing regulations during these peak periods will be very restricted, if at all. Citizen requests for assistance may be unanswered.

FISHERIES

Fishing in Oklahoma generates over \$359 million to local economies. When fishing declines, so do local businesses, particularly those who would not exist if it were not for fishing. Good fishing is a product of fish population monitoring and proper fisheries management.

Impact of the 40-hour workweek has caused fisheries workers to reduce this effort in order to comply. Many times, the 40-hour "time clock" runs out by late Wednesday or Thursday and forces workers to drive back to their homes without completing the task, only to return to the same location again after the start of the next week. This reduces their ability to provide sound management.

GAME MANAGEMENT

Area assistants who live on public hunting areas in department housing are not able to serve the public, protect land from wildfires, et cetera, if the 40-hour workweek restriction continues. If 40 hours is achieved on Wednesday, for example, and a wildfire occurs with the possibility of destroying thousands of acres of habitat or can endanger private land holdings, the employee can take no action.

Beyond wildfires, with resident help off duty there will be less patrolling and supervision of the areas. More opportunity for vandalism and poaching will exist. Further, with our enforcement officers restricted to 40 hours, they have less time to devote to our public lands. The end result will be critically low enforcement and management of these public lands.

Problems will also occur during hunting seasons, particularly deer season. Management and supervision of hunts requires 100 percent of the time of both the manager and his assistant. Work-

days of 14 to 18 hours are not unusual, and it obviously does not take many days to complete a 40-hour week. We must then either leave some gates unattended and some or most hunts poorly supervised or not supervised at all.

Production at the game farm has been impacted by the 40-hour restriction on the hatchery assistants.

EMPLOYEE MORALE

General adverse impact on employee morale has resulted since implementation of the *Garcia* decision. Employees have lost the ability to take extra days off during their slack periods. There is a feeling of being frustrated because they no longer can do a professional job.

The *Garcia* decision has not saved the employees from inordinate work or provided compensation for extra efforts. To the contrary, it has removed many job-related benefits with no increase in pay and took away their opportunity to adjust their own work to best serve the citizens and wildlife resources of this State.

The end result of the above problems will be a reduction in the quality of Oklahoma's outdoor resources. We know from history that our deer, turkey, and other species can be impacted and even eliminated by poaching. But without the ability to respond to landowners' reports of poaching, who will prevent it from happening?

The entire realm of hunting, fishing, and related private commercial interest are dependent on proper management and protection. One cannot survive without the other. The Oklahoma Department of Wildlife Conservation cannot meet its responsibilities without flexibility in its work schedule.

To be effective, there needs to be an option to allow comp time to be accumulated and to be used over an extended period of several months.

For the benefit of Senator Nickles and others, the cost to the Oklahoma Department of Wildlife Conservation to provide a basic overall 10 percent of overtime pay would cost \$900,000 a year. To provide just a minimal 10 percent law enforcement the cost is \$353,000. These are funds that we do not have. I also pointed out that to achieve a \$932,000 overtime pay, we would have to increase our license fees by about \$1.30 cents beyond what they are now. So it is a significant amount of money that the department does not have and will not have in the near future.

[The prepared statement of Mr. Lewis follows:]

2 added 9/7

WILDLIFE CONSERVATION COMMISSION

L. B. SELMAN CHAIRMAN	DON R. GREENHAW MEMBER
CARL PIERCEALL VICE-CHAIRMAN	"H. B." ATKINSON MEMBER
JOHN D. GROENDYKE SECRETARY	K. E. PENNINGTON MEMBER
ROY BOECHER MEMBER	JOHN GIBBS MEMBER



STEVEN ALAN LEWIS, DIRECTOR
CHARLES R. WALLACE, ASSISTANT DIRECTOR

DEPARTMENT OF WILDLIFE CONSERVATION

1901 N. LINCOLN

P.O. BOX 53466

OKLAHOMA CITY, OK 73152

PH. 521-3851

Testimony by: Steven Alan Lewis, Director
Oklahoma Department of Wildlife Conservation
Post Office Box 53466
Oklahoma City, Oklahoma 73152
405-521-3851

Before: Senate Labor Subcommittee Hearing S 1570
Oklahoma City, Oklahoma
August 28, 1985

Thank you. My name is Steve Lewis and I am Director of the Oklahoma Department of Wildlife Conservation.

Senator Nickles and Members of the Subcommittee, it is a pleasure to personally appear before you and provide testimony on impacts of the "Garcia Decision" on the ability of the Oklahoma Department of Wildlife Conservation to meet its management and protection responsibilities.

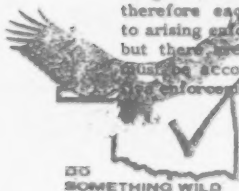
The requirement of having to pay overtime and/or adjust work week lengths to comply with the "Garcia Decision" has reduced the Oklahoma Department of Wildlife Conservation's ability to manage and protect entrusted state resources.

The impact of the "Decision" is a loss of flexibility to meet seasonal work peaks and not a reduction in the total annual work effort. The "Decision" provides that any work beyond the basic 40 hours must be compensated for by overtime pay at a rate of time and a half. The Oklahoma Department of Wildlife Conservation does not have the funds to pay overtime and therefore cannot allow any employee to work over forty hours per week. The Department is on a fixed income derived from license sales and does not receive supplemental general revenue appropriations.

The Oklahoma Department of Wildlife Conservation must then end employees work week when a total of 40 hours are accumulated. This means the end of a particular management or enforcement effort for that week. Examples of specific impacts are outlined below for specific Department areas of responsibility.

Enforcement

Wildlife Law Enforcement is very unique in the field of law enforcement. In most instances, one officer is responsible for the wildlife law enforcement of an entire county. That officer must respond to the requests for enforcement by both concerned sportsmen, concerned citizens, and landowners in their assigned area. There are no two counties with identical enforcement problems, therefore each officer must formulate the method in which they respond to arising enforcement problems. Not only do they have enforcement problems, but there are public relations tasks with various groups and individuals that must be accomplished. Also, there are periods or seasons of the year when enforcement officers assigned to a county would not be enough personnel.



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Since the "Garcia Decision" mandates that comp time cannot be saved over several months for later use and the Department cannot afford overtime, each officer is restricted to 171 hours in 28 days or to a 41 or 42 hour week with no variance.

The end result has been and will continue to be that during the traditional fall hunting seasons, dove, archery deer, rifle deer, primitive deer, quail, turkey, waterfowl, etc., our officers will be unable to properly check hunters, enforce the laws, and assist landowners with hunting related problems. Enforcement of fishing regulations during these periods will be very restricted, if at all. Citizen requests for assistance may be unanswered.

Fisheries

Management and Research Efforts - Fishing in Oklahoma generates over \$359 million to local economies. When fishing declines, so do local businesses, particularly those who would not exist if it were not for fishing. To a great extent, good fishing is a product of fish population monitoring and proper fisheries management. When problems occur which result in declines in fishing success, it becomes the job of the fisheries manager to identify the problems and solve them. Annual monitoring of fish populations helps the biologist understand what is affecting fishing success and gives a base for making recommendations to improve the population.

Population monitoring requires many hours of field sampling by fisheries workers during times when fish are most vulnerable to collection methods. During the spring months, Fish technicians and biologists spend long hours in the field sampling populations that are spawning and vulnerable to capture. In order to collect adequate sample numbers for reliable data and assessment, these workers stay with the job for as long as it takes to get the job done - many times spending 50 or more hours afield during a typical weekly spring sampling period. In some cases, workers must travel up to 4 hours, one-way, just to reach a particular lake scheduled for sampling.

Impact of the 40-hour work week has caused fisheries workers to reduce this effort in order to comply. Many times, the 40-hour "time clock" runs out by late Wednesday or Thursday and forces workers to drive back to their homes without completing the task, only to return to the same location again after the start of the next week. The only alternative at present, excluding reduction in effort, is to hire part-time employees and run shifts between work crews. Again, the Oklahoma Department of Wildlife Conservation does not have funds to pay overtime or pay additional work crews, so work is stopped prior to completion.

Game Management

Area Assistants who live on public hunting areas in Department housing are not able to serve the public, protect land from wildfires, etc., if the 40 hour work week restriction continues. If 40 hours is achieved on Wednesday, for example, and a wildfire occurs with the possibility of destroying thousands of acres of habitat or can endanger private land holdings, the employee can take no action.

Beyond wildfires, with resident help off duty there will be less patrolling and supervision of the areas. More opportunity for vandalism and poaching will exist. Exempt personnel cannot fill in as it is physically impossible to work 24 hours per day. Further, with our enforcement officers restricted to 40 hours, they have less time to devote to our public lands. The end result will be critically low enforcement and management of these public lands.

Problems will also occur during hunting seasons, particularly deer season. Management and supervision of hunts requires 100 percent of the time of both the manager and his assistant. Workdays of 14-18 hours are not unusual and it obviously does not take many days to complete a 40-hour week. We must then either leave some gates unattended and some or most hunts poorly supervised or not supervised at all. The alternative is to use untrained temporary help who do not know how to handle problems or unexpected situations and who cannot gather data properly or accurately and again which there are not funds for. Lastly, when the public on the area requests help, we cannot respond after the 40 hour work week is completed.

Production at the Game Farm has been impacted by the 40-hour restriction on the hatchery assistants. This work is seasonal in regard to extra duty (February-July). At the close of hatching season, comp time normally could have been given. Since implementation of the 40-hour week, we have had to resort to using unskilled hourly workers with a high turnover rate of employment to try and achieve production quotas.

Because the temporary labor is unskilled and our permanent force so small we must spread our permanent employees out very thin to ensure that someone is on duty to handle the unexpected. Any absences among the permanent employees (injury, illness, emergency leave) creates a real manpower problem and at a game bird hatchery, failure to correct a problem can result in loss of the entire production. Under present regulations, we must now let all work, except bird production, go undone during the production period.

Employee Morale

General adverse impact on employee morale has resulted since implementation of the "Garcia Decision." Employees have lost the ability to take extra days off during their slack periods. There is a feeling of being frustrated because they no longer can do a professional job.

The "Garcia Decision" has not saved the employees from inordinate work or provided compensation for extra efforts. To the contrary, it has removed many job related benefits with no increase in pay and took away their opportunity to adjust their own work to best serve the citizens and wildlife resources of this state.

The end result of the above problems will be a reduction in the quality of Oklahoma's outdoor resources. We know from history that our deer, turkey, and other species can be impacted and even eliminated by poaching. But without the ability to respond to landowners' reports of poaching, who will prevent it from happening.

The entire realm of hunting, fishing, and related private commercial interest are dependent on proper management and protection. One cannot survive without the other. The Oklahoma Department of Wildlife Conservation cannot meet its responsibilities without flexibility in its work schedule.

To be effective, there needs to be an option to allow comp time to be accumulated and to be used over an extended period of several months.

Thank you.

Senator NICKLES. Thank you very much.

We now have Capt. Larry Owen with the highway patrol.

Captain OWEN. On behalf of Commissioner Reed and the Oklahoma Department of Public Safety, I would like to thank you for the opportunity to appear before you and express the department's position on the Fair Labor Standards Act.

Senator NICKLES. Captain, before you start, I would like to ask all our witnesses to summarize your statements because we have two more panels, and I do not want to cut them off.

Captain OWEN. I will attempt, in the next few minutes, to highlight what we view as the major difficulties in trying to operate an appropriate State agency concerned with the public safety and welfare of the citizens of this State under the Fair Labor Standards Act.

The major difficulties we are experiencing and anticipate growing worse are with mission and morale. Law enforcement by its very nature tends to be a mission-oriented operation concerned primarily with accomplishing the mission without being overly concerned during the operation with the manpower necessary to accomplish the task. Many situations in which we find ourselves are life-threatening and having adequate resources available is critical. The circumstances to which I refer are the extraordinary events, such as natural disasters, that is, tornadoes and floods, the man-hunt and hostage situations, prison riots, or other occurrences that consume many hours of law enforcement personnel time. Events such as these can be and have been devastating to a fixed budget.

I do not mean to imply that our everyday chore of providing adequate coverage is simple under Fair Labor. The highway patrol, like most other law enforcement agencies, is a selective organization. We spend many hours trying to place our personnel in the places and at the times our experience has shown will be our biggest problem areas. Anything that tends to deplete our limited manpower, such as compensatory time within a 28-day period, virtually eliminates adequate coverage.

Most State police or highway patrol organizations are from one-quarter to one-third under manpower compared to vehicle miles traveled. Oklahoma is no exception. Because of our geographic location, we have one of the highest vehicle miles traveled per trooper in the United States. In most of our detachment areas, especially in the western portion of the State, we have one or two troopers covering hundreds of square miles. Any system which takes the scheduling of compensatory time out of the hands of the troop commander and requires that that compensatory time be scheduled within a fixed period—7 or 28 days—makes it impossible for the commander to maintain adequate coverage.

The problem is compounded with our noncommissioned personnel such as communications who are on a 7-day cycle for compensatory time. We are thinly staffed in most troop situations and during occurrences, as I have mentioned above, where mobile command operations are necessary, communications personnel are called upon to work extremely long hours. In these situations communications personnel on the scene accumulate many hours of overtime as do the personnel taking up the slack in the troop area they vacated.

The other factor I mentioned at the outset was morale. This issue is not a labor management situation; on the contrary, both labor and management view the imposition of the Fair Labor Standards Act as having a more negative effect than positive. The vast majority of our personnel favor compensatory time rather than overtime pay, but they do not favor any system which requires that time be taken within a fixed timeframe as short as 7 or 28 days.

Most of our personnel are career law enforcement or public safety personnel. They have spent their entire working career explaining to their families why they have to work this weekend or this holiday while all the neighbors are preparing for a weekend at the lake. Among the consolations has always been the flexibility to add a day or two on the upcoming vacation or to have enough comp time accumulated to watch a son or daughter in a school play during a normal duty shift. Once this flexibility is removed, you will formalize in a negative way what has always been an informal and very comfortable situation between the employee and his or her supervisor.

In conclusion, Senator, we would like to urge Congress to provide an exemption to the Fair Labor Standards Act for law enforcement and public safety agencies and, short of an outright exemption, at least a system flexible enough to allow agencies to determine the scheduling of time within the framework of manpower needs.

Senator NICKLES. Thank you very much, Captain Owen. I appreciate your comments.

Mr. Lewis, you mentioned the fact that the Oklahoma Department of Wildlife, particularly in hunting seasons, work 14 to 18 hours a day. I think that dove season begins on Saturday?

Mr. LEWIS. Saturday the 1st.

Senator NICKLES. I am guessing that during the hunting seasons your people work quite a bit of overtime, and when the hunting season ends that is when they would take their comp time. Do they really load up on their hours during the busy season and then take off maybe in late December?

Mr. LEWIS. Senator, you are absolutely right, and so do the fisheries people and our game people. They work the periods of time that they need to, starting with dove season, quail season. They work long hours, but then they do have slack periods which are cold months. In fact, during some of the hot months there is no activity, and they do take the time off.

Senator NICKLES. I would think that during a lot of these seasons, like deer season, there is a lot of activity going on. Some of it is trespassing or poaching before season or after season and so on. There would be demands for extra time and services at that time. You touched on budgeting and know exactly what you're going to be paying and maybe come out basically even.

Are the employees satisfied? You used the word "was," and so did Captain Owen. Does it bother them that they might not be able to have comp time?

Mr. LEWIS. It bothers our employees quite a bit. For example, during the summer months Fisheries determined what needs to be done and does it because they will be able to take the days off later.

Our enforcement people, in a similar vein, look forward to other times of the year. I guess they feel like they have not only lost this benefit, but they have also lost the opportunity to do a quality job. For example, you may be on a stakeout and know that there is some illegal poaching going on. You feel like staying an extra 3 or 4 hours just might make the difference of a successful operation, but the 40 hours requires you to go back home. They feel like they are no longer allowed to do the professional job that they want to.

Like I said in my testimony, I do not believe it is going to affect the total work effort for the year because they were taking the time back off at other times. What it has done is reduce the flexibility to accomplish the job on our behalf, as far as the agency and for the employees, it has reduced his flexibility to plan special activities during that off period.

Senator NICKLES. Captain Owen, you mentioned the same thing, but you also mentioned morale. We heard Mr. Orndorph talk about the police officers needing time off after they have been involved in difficult operations. Do you think that is an important aspect also as far as police enforcement?

Captain OWEN. It is critical to our people to be able to work extremely long hours in manhunt situations. Just the everyday rigors of, you know, up and down the asphalt.

It is in most of our western counties that we are experiencing most of our difficulties right at the present time. We have, for example, when a trooper nears the end of his 28-day cycle, the troop commander monitors his time daily simply so he will not have to appropriate funds. For example, they give the trooper off in Roger Mills County, which is a very large county. If the trooper in the next county adjacent to him happens to have the day off, we are looking at possibly having to send a trooper over a hundred miles to provide service to that community or that county.

That is a problem. It is compounded from the standpoint that counties historically have been under the sheriff's officers, and we have tried to take up some slack there and provide them with some additional assistance. Now, you have placed us all in the same boat of not being able to have that done under this particular decision.

Senator NICKLES. What kind of reaction have you had from the troopers themselves? Do they have the option of comp time or overtime? You mentioned the word "morale." Are they bothered by the fact that the Supreme Court decision would take away comp time as an alternative?

Captain OWEN. They are bothered mostly because it has taken away the flexibility to try and schedule that comp time when it is most convenient for their activities, for their family activities. We have had a system for the last several years where we schedule so much overtime for special occurrences where we know we can anticipate ahead of time, and that is worked out and understood, but even when we have it built in, in most instances when the trooper has the option, which he has with us or did have until the Garcia, they will still take the comp time. It is much more important because of the way they are. We work on a fixed schedule per week. Let us say in a two-man situation when you are away from your family at least three nights a week, and you are away from your family at least 1 weekend day a week. So that is the situation

there. They build up comp time and build it into their system to keep that family organized and going. This decision has rendered that impossible.

Senator NICKLES. We appreciate your appearance before the committee. Thank you very much.

On our next panel are Steve Cain, treasurer of the Fraternal Order of Police, and Thomas A. Riddle, business agent, Professional Fire Fighters of Oklahoma. Mr. Riddle, would you care to begin?

STATEMENT OF STEVE CAIN, TREASURER, FRATERNAL ORDER OF POLICE, OKLAHOMA CITY, OK; AND THOMAS A. RIDDLE, BUSINESS AGENT, PROFESSIONAL FIRE FIGHTERS OF OKLAHOMA, OKLAHOMA CITY, OK

Mr. RIDDLE. The stated positions of the International Association of Fire Fighters and their affiliate locals in Oklahoma has been and is in support of the *Garcia* decision in bringing under the standard all State and local government employees. We agree with the Court and the Congress that the Fair Labor Standards Act has established employment standards for many years that are common throughout the private sector, as well as extending the standard for Federal employees.

Federalism is not imposed unfairly or in violation of the Constitution where the common interest is served. We have experienced since 1964 the application of title VII, and we note today that Federal intervention has in fact been in the interest of the public as well as the communities where public employers and employees serve. We can assure you that prior to title VII, minorities were discriminated against in State and local government. And we can further assure you that public employees were discriminated against in terms of employment standards prior to the *Garcia* decision.

A recent survey compiled by the Oklahoma Municipal League published in the Daily Oklahoman, August 27, 1985, estimates an increased cost in 128 cities to be \$5.7 million. This would on its face imply an economic hardship on cities and towns in Oklahoma. It is interesting to note that of the 128 municipalities surveyed, 79 plan to maintain their current level of service; 19 plan to cut personnel, 10 would eliminate certain public services, and 22 indicated services will be reduced. Only 8 municipalities will eliminate some police services; however, 11 cities said they would add uniformed personnel; cities plan to reduce pay and another 10 reduce fringe benefits.

In the area of fire protection, three cities indicated they will close some fire stations, while three others will reduce firefighters' pay and seven plan to reduce fringe benefits.

These reports are based on, at best, projected planning, as there is no accurate way to measure the increased costs until June 30, 1986. The impact of the standard will be viewed, we suspect, on a month-to-month basis, but from a practical standpoint under Oklahoma statutes, most cities have approved and have in place an 1985-86 budget. In fact, of our 47 local unions, there are only 9 that have not reached agreement. With the exception of three of

the above nine, the differences regarding the FLSA have been resolved.

Overall, any actions taken by the Congress should be considered after the data is in, and it is our feeling that the enormous costs predicted by the State and local governments cannot be determined until the final audit for fiscal year 1986 is completed.

However, there should be no question in today's society that State and local government employees should receive the same protection granted their counterparts in the private and Federal sector. For too long, except in those few States where there is collective bargaining for public employees, these dedicated folks have been considered under the law nothing more or less than bonded servants to the elected and appointed officials of State and local government.

If the standard is a violation of the Constitution, then it would follow that FICA, Social Security, Unemployment Insurance, and Title VII are also in violation of the Constitution. The argument that the standard will financially bankrupt State and local government is, at best, speculation. At the outside, one might see a 3-percent increase in personnel costs, and depending on the willingness of public managers to manage, it could be zero to less than 1.7 percent.

In our review of the standard, we find more than adequate the necessary flexibility for State and local government to manage their overtime exposure. Exceptions are granted under 7(k) for police, ambulance, and the fire service in recognition of the vital role they play in public safety.

There has been a great deal of comment about compensatory time. It should be noted that historically there have been agreements executed in Oklahoma recognizing comp time provisions and the administration of comp time has not always been in the interest of the employee. In most of our contracts there is a catch 22, that is, comp time may be used at the convenience of the employer, and to our knowledge, it has been for hour as opposed to time-and-a-half. In some of the agreements, if comp time provisions should be as flexible as all other provisions of the standard, but the minimum under no circumstances should be different than outlined under the overtime provisions.

In conclusion, the I.A.F.F. affiliates throughout Oklahoma feel that the impact of the standard has been overstated by State and local government. In fact, the greater majority of our members were already receiving overtime compensation prior to the *Garcia* decision.

If there is an impact, this will not be known until the end of this fiscal year, and certainly if there is a need for legislation, then it should not take place until the data is in.

In the sense of fairness and equity, the employees of State and local government should have the same protection from their Federal Government as granted employees of said 68 Government and private sector employees.

As to specific areas, for instance, comp time provisions, again, any conclusions should be reserved until we have had the opportunity to work under the standard period of time so that some accurate determinations can be logically drawn before further excep-

tions are considered by Congress. That constitutes my comments on the firefighters I represent in Oklahoma.

I also have present here Mr. Stone, who is the president of our largest group, and he has had some problems pertaining with the noises under the standard which you may be concerned with.

Senator NICKLES. Thank you very much, Mr. Riddle.

Next we have Mr. Cain, who is the treasurer of the Fraternal Order of Police.

Mr. CAIN. Senator Nickles, I am Steve Cain, a member of the Norman, OK, Police Department. I am also the immediate past president of Norman Lodge No. 122 of the Fraternal Order of Police, the bargaining agent for the members of my department. I am also treasurer of the Oklahoma State Fraternal Order of Police and chairman of its labor and legislative committees.

Before contracts, before negotiated agreements and letters of understanding, before *Garcia v. San Antonio Transit Authority*, police officers in scores of communities in Oklahoma and hundreds of cities across this Nation were deprived of compensation for working hours in excess of their normal shift.

I know, because prior to contracts, I personally lost hundreds of hours in compensatory time or pay because my city was either unwilling or unable to pay me for the extra hours I worked to do my job right. Like most dedicated police officers, I wrote my losses off to experience and for the good of the community I served. I cannot afford to do that any longer. I am fortunate now, working under a contract, to get my overtime compensation immediately after it has been worked.

As chairman of the State FOP labor committee, I am often called upon by FOP members from other cities to assist and advise them in their local contract negotiations.

In many cities in this State, overtime compensation is an unknown term. Many police officers in this State are forced to work from 42 to 45 hours per week as part of their normal shift and are paid for 40 hours.

Many officers are given compensatory time at straight time for overtime hours but are not allowed to use this comp time within the time limits cities establish and, thus, lose the comp time and their compensation for overtime. Other cities offer overtime only under certain circumstances such as court time and then only at straight time. State law enforcement agencies, such as the Oklahoma Bureau of Investigation and the Oklahoma Bureau of Narcotics and Dangerous Drugs, gave their agents compensatory time at straight time for overtime hours. This comp time was granted only as workload permitted resulting in some officers having as much as 2,000 hours of comp time banked after only 4 years with the agency and no immediate hope of being able to utilize that time.

City and State governments across the Nation are protesting the impact of *Garcia* as a financial burden to their budgets. The practices of many of these agencies in not fairly compensating their employees for overtime has been a financial burden to the employees for many years.

Because of *Garcia*, thousands of police officers are now, just now, receiving overtime pay for their hours worked. We cannot afford to return these officers to the chaotic conditions of the past, and

again deprive these officers compensation for hours worked. Public employees, especially law enforcement, do not want to be removed from the provisions of overtime compensation under the Fair Labor Standards Act.

Yes, law enforcement is willing to accept overtime compensation in the form of pay or time off, accumulated at the rate of time and one-half.

Yes, law enforcement is willing to give public agencies room to operate financially, so that employees and employers can mutually agree on a just system and method of compensation.

Yes, law enforcement would be willing, through mutual agreement, to allow for payment of overtime by money or time off both accumulated at the rate of time and one-half, with the time off to be deferred until it can best be taken, with reasonable limits on total accumulation and limited to 1 year on deferral with cash payment made after that time to the employee at his option.

No, law enforcement is not willing to give total discretion for payment to public agencies.

No, law enforcement is not willing to give up employees' rights in contractual agreements.

And, no, law enforcement is not willing to again allow our non-contractual employees to be thrown back to the wolves who would deprive many of our nonnegotiating agencies their right to be compensated for hours worked.

The Fraternal Order of Police believes the *Garcia* decision to be a just interpretation of the rights of public employees. While we agree that some provisions should be made to allow public agencies flexibility in handling overtime compensation, we strongly argue the guaranteed right of the public employees to be compensated for overtime work, regardless of the presence or absence of a contractual agreement. We look forward to working with public agencies in the application of new compromise fair labor standard legislation to come out of this Congress.

Thank you, sir

Senator NICKLES. Thank you very much, Mr. Cain.

Mr. Stone, do you have any comments you would like to make?

Mr. STONE. Yes, I do. Thank you very much for the privilege to be here today in the city of Oklahoma City.

We came to the bargaining table this year and saw our city react in what we feel is probably one of the more negative reactions in the State of Oklahoma concerning the Fair Labor Standards Act. In the beginning of this meeting today, you made the statement and I agree with that statement that State law and local government should have a tremendous impact upon what happens to all people who work and live in the State of Oklahoma. In the State of Oklahoma today, we have an elective bargaining law. This law has been agreed upon and is part of the—well, it gives us the right to set and negotiate a contract, and the type, and it guarantees us certain things under the statute. It deals with wages and hours and conditions.

We believe that the city of Oklahoma City, which is the only one that I know that much about—I cannot really speak for anyone other than the people that I represent in Oklahoma City.

We believe that this is definitely the worst case in the city of Oklahoma City. We reviewed the city's position where it says that in the city of Oklahoma City it would cost \$1 million a year for pay in 5 years' overtime. If you actually accumulate and calculate the cost of overtime accumulated in the last 25 days in the city of Oklahoma City, the cost was less than \$9,000.

On the Oklahoma City Fire Department, the actual overtime would be many dollars less than the city's worst-case scenario. The city of Tulsa which is larger, has a larger fire department than the city of Oklahoma City, allowed \$200,000 for overtime in the next fiscal year in their budget year.

It is our contention that these figures are much more accurate and concern the actual impact to the city of Oklahoma City and the overtime obligation. Our figures indicate that the firefighters cost for paying overtime would be between 2 and 3 percent of the actual salary impact that the fire department makes.

The firefighters under the Fair Labor Standards Act are not allowed to collect overtime until after they have worked over 83 hours in 1 week, while other employees of public safety are allowed overtime after a 43-hour week, and overtime is paid only for other employees.

It is our contention at this time to give them much more leeway, which is not fair to working firefighters in Oklahoma City. Comp time under the Fair Labor Standards Act is already allowed.

We believe that, in closing, most of the items under the Fair Labor Standards Act concerning firefighters can be handled through the Department of Labor and we want to see it. It is also our position, and I agree with Mr. Riddle, that we should wait 1 year.

Senator NICKLES. Thank you very much, and thank you to our panel.

I heard all of you say that you wanted to be able to work with the cities or whoever and have the flexibility and also have comp time as an option.

Under my interpretation of *Garcia*, that is not an option. Therefore, employees who you are representing have lost that. That is what we are hearing from the Tulsa police, and they are given the option right now. Under the *Garcia* decision, my staff, who knows more about this than I do, say they do lose that option. In some cases, there is the option, and under *Garcia* they lose that option. We heard several people say either by letter or by their statement that they do not want to lose that option. They want to be able to take that comp time and use it.

I heard all of you say that you wanted to have some flexibility. I do not see that coming from *Garcia*. This means that we have to have legislation unless the DOL comes up with some regulations that allow that flexibility. I do not see that coming from the DOL now. DOL's enforcement looks pretty rigid as far as comp time. The Department of Labor regulations state that as a general rule all overtime must be paid for in cash and then it has partial exception in it. I will just touch on that.

If an employee works more than the stated number of hours in a 7- or 28-day work period, overtime and comp must be paid at 1½ times the employee's regular rate. You might get a staff together and see

what kind of flexibility you have. I do not think much flexibility is offered.

Mr. RIDDLE. Let me sentence that, Senator. As a general rule, you have got to understand, Senator, that only 19 Senators in the United States have any kind of political party public employees, and that is mostly for fire, police, and some teachers. So when you implement the standards, you are really implementing a master/servant kind of relationship. You are dealing with a majority of public employees across this Nation who do not have any kind of collective bargaining.

Senator NICKLES. Let me just make a comment. I do not want to interrupt you, but my interpretation basically is that this makes you amend or basically abrogates all of your existing collective bargaining agreements if you have comp time as an option. That is a problem I have, and I think it bothers you, too. The fact that you have negotiated in good faith with the cities or whatever, and in many cases worked out an agreement that is to your mutual advantage, and here comes a court decision that says we do not care what you negotiated, but you have to comply with this format.

I think you all should have the option of working that out. I have a problem with us or the Supreme Court abrogating your contracts which were entered into in good faith on both sides and which seem to have worked; maybe not all of yours, but a lot of them have.

Mr. RIDDLE. Again, these are matters that will be dealt with by the DOL on complaint. It is our position, and so far we have failed this without a whole lot of complications, that the provisions of the collective bargaining agreement in this area, as long as they meet the minimum standard or exceed the minimum standard, then the DOL's rules are not as hard fast as they might be if it is not a collective bargaining.

We have to recognize the majority of unemployed is not covered under these agreements, so administrative assistants, civil service, these sorts of things is—I do not know how they are going to deal with them. What we are really saying, Senator, is the Rules Committee, the DOL, are reasonable, too.

We are not trying to chastise the Supreme Court of the United States or the Department of Labor. They have a problem, too. They are going to have to administer this. I think that, given the time to see what the problems are, then if legislation is needed, fine. We will support the legislation. We do not want to put our employer out of business.

Senator NICKLES. I appreciate your comments. I also appreciate all of our panels' comments. I want to continue working with you and keep our dialog open and work with the DOL because, again, I think I heard everybody say they want flexibility; they want to be offered comp time. I do, too. I want you to have that option. I do not want to mandate comp time. I do not want to mandate over-time. I want you to have that option.

Mr. STONE. Senator, if I may, I want to point out right now, in the city of Oklahoma City today, of the 680 employees that I represent, there have never been more than 30 that have had any kind of comp time provision. The problem with firefighters dealing with comp time is we work such an unusual schedule of 56 hours a week

that we have never even received comp time, much less overtime. We have had no compensation with the long workweek that we have worked, so when we start talking about comp time, it is just as new to us as it is talking about overtime, and I just want you to be aware of that.

Senator NICKLES. Do you have any comments, Mr. Cain?

Mr CAIN. One comment. There is, as you said, some minor flexibility under section 7 of FLSA. Basically what you are looking at is the 171-hour limitation on a 78-day work period for law enforcement. A normal work period in a 28-day cycle is less than that. There is some flexibility within that difference for comp time, but you are limited. And once you reach that threshold after 171 hours, the option is taken away. It is overtime or nothing. As I said, we would like the option.

Senator NICKLES. You are saying in a case like that it might be of benefit to them. In Norman, you worked out some kind of amicable agreement and the people are happy with it.

Mr CAIN. Right; what we would like to see is something that would set up some minimum standards, the options that we have in Norman, that we have in Oklahoma City, in Midwest City, or any of the larger areas that have contracts.

Senator NICKLES. I appreciate your comments and all of your willingness to work with us.

I think most of you know Rick Lawson, who is sitting behind me. He is my chief counsel on this issue. We will try and stay in touch with you and see if we cannot work out something.

On our next and final panel are Carl Weinaug, city manager of Stillwater, and Craig Weinaug, city manager of Ardmore; Robert Allen, Oklahoma City municipal counselor, and Roger Cutler, city attorney of Salt Lake City, UT, representing the National Institute of Municipal Law Officers.

STATEMENT OF CARL WEINAUG, CITY MANAGER OF STILLWATER, OK; G. CRAIG WEINAUG, CITY MANAGER OF ARDMORE, OK; ROBERT D. ALLEN, OKLAHOMA CITY MUNICIPAL COUNSELOR, OKLAHOMA CITY, OK; AND ROGER F. CUTLER, CITY ATTORNEY OF SALT LAKE CITY, UT, REPRESENTING THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

Mr. CARL WEINAUG. Chairman Nickles and members of the Labor Subcommittee, I am Carl Weinaug, city manager of Stillwater, OK. This community of over 40,000 residents appreciates your willingness to introduce legislation to alleviate the hardships that the *Garcia v. San Antonio Metropolitan Transit Authority* decision will have on local governments and their employees.

First, a little background on the city of Stillwater. We have 390 employees. Police and fire operate with collective bargaining agreements. Our relations with our employees and the unions have been excellent. No grievances have been filed in the last 3½ years. Our system of wages and working conditions has been trouble free.

Now, the FLSA rules have complicated, if not jeopardized, this relationship. To meet the sudden deadlines imposed, we are forced to make decisions without sufficient time to explain to and consult with our employees.

Our biggest problem is determining rules. As yet, the Department of Labor is still taking our questions under advisement while declining to provide answers in writing. This makes it difficult to explain to employees, to decide what to do, and to estimate the cost of compliance. A strict interpretation could cost Stillwater \$625,000.

Proposed rules should be published before they are enforced with a time period for response by the public. Otherwise, the *Garcia* decision may cause and do more harm than good.

The rules regarding standby have been our greatest concern. Standby is extensively used in the water, sewer, and ambulance departments in Stillwater to handle emergencies after hours. In return for a weekly payment of 12 hours at straight time, an employee agrees to keep the dispatcher advised as to their location during standby duty. When called to work, time and a half is paid.

Under FLSA it was originally thought the city would be forced to pay time and a half for all hours on standby, regardless of whether any work was performed since standby constituted a constraint of personal pursuits. It now appears permissible to use papers to allow the employees to conduct whatever personal business is needed and yet still be available. This interpretation may reduce our cost of conformance by approximately \$400,000.

The city of Stillwater is concerned this interpretation may not be the final one. If not, the city will be forced to discontinue the standby method of emergency response. To handle an emergency, the city will have to begin telephoning until an employee is found that will volunteer to respond. Finding employees on weekends can be a time-consuming process. Getting one to volunteer to work a sewer backup at a residence or work a broken water main in the winter may be another problem.

Meanwhile, the residents needing service are left waiting. Without our current system, the employee is also hurt. Stillwater employees volunteer for standby pay on a rotating basis. This weekly payment would be eliminated as a direct result of FLSA, thereby eliminating a supplemental payment that many employees have come to depend on. In this case, no one is helped and everyone hurt.

The FLSA method of computing base pay to determine the time-and-a-half rate will also hurt employees and the public. The method requires cities to include incentive pay in the formula. This will discourage local governments from encouraging their employees to seek advanced training in areas like emergency medical services and law enforcement in return for pay bonuses. The overtime rate computation should exclude incentive pay.

The FLSA applies more to assembly line work than the service providing functions of local government. Punching a time clock promptly at 5 on those jobs that require public contact is not always possible. In order for the employer to protect the city from suit for violation of the standards, the employee must be required to promptly leave work in less than 5 minutes. The paperwork and liability concern of the employer make it too difficult for the employee to volunteer to pursue a project on his own time.

A Stillwater police officer recently volunteered his time to prepare a grant application for improved enforcement of the driving

under the influence laws. FLSA will discourage dedicated employees from taking initiatives to improve services for the public.

Stillwater has conscientiously worked with its employees and employee groups and negotiated agreements. Those agreements meet the needs of Stillwater and its employees. Substituting these agreements with the judgments of distance—Federal officials undermines our system of federalism. At most, those judgment should be guidelines that would provide a means to resolve whatever gross inequities may exist while at the same time leaving the fine-tuning to local control.

Public employees have more avenues of influence on their wages and working conditions than their counterparts in private industry. All public collective bargaining does not take place at the negotiating table. Political appeals typically occur before, during, and after negotiations with elected local officials who are uniquely vulnerable to this process. What is not achieved politically at the local level then becomes proposed legislation at the State and then the Federal levels.

The lack of interest in FLSA amendments by many congressional representatives verifies the the fact that public employees have the means of influence and have exercised them in many areas of the country to obtain favorable conditions of employment. The strict controls being considered by the DOL are, therefore, unnecessary.

If some degree of decisionmaking authority is not left at the local government level, special interest groups that answer to no one will eventually leave the public without the means to control their destiny. As Members of Congress, you can relate to this after your recent efforts to cut Federal deficits and enact tax reform. Please do not allow a decline in local governments' ability to operate efficiently at the grassroots of our democracy.

Thank you.

Senator NICKLES. Craig Weinaug.

Mr. CRAIG WEINAUG. I appreciate the opportunity to testify before this Senate subcommittee on S. 1570. I am Craig Weinaug, city manager for the city of Ardmore, OK, a community with a population of approximately 25,000.

As a local government official, I have never before become actively involved in attempting to lobby for or against any legislation considered by Congress, but never before have I seen legislation which constituted such an unwarranted intrusion into local government prerogatives and powers as is the case with the Fair Labor Standards Act.

The Fair Labor Standards Act places an extraordinary burden on local governments, due to the service nature of our responsibilities. It is the primary function of local governments to protect the public health and safety of its citizens. The very nature of this function means that many personnel working for local governments are continually subject to call for essential services.

Hence, many jobs are not tailored to a 40-hour period. You cannot stop putting out a fire just because a shift has ended. You cannot tell a heart attack victim or crash victims that an ambulance cannot be sent because our overtime budget has already been spent.

Investigation of most types of crimes cannot be done effectively on a 43-hour work schedule. Sewer blocks which cause sewage to back up in people's homes cannot wait until Monday morning at 8 o'clock to be fixed. You cannot tell a street crew not to clear trees from the street just because the storm chose the wrong time of day to hit the city. All of these and similar services must be provided to fulfill our public safety obligations to the citizens.

In addition, as city manager, one of my primary functions is to perpetuate an attitude of public service among city employees. Special occasions, such as Christmas parades sponsored to raise money for charitable purposes, have previously been manned by policemen on a voluntary basis. Under the Fair Labor Standards Act, even policemen who want to work such parades voluntarily must be paid for such occasions. We now calculate that such parades will cost the city approximately \$2,000 each in overtime.

In most businesses, work can be scheduled to avoid some of the higher costs imposed by the Fair Labor Standards Act. This is somewhat true with the city, but such scheduling will have extreme negative effects on our labor. Cities are being forced to respond by establishing work rules which are more restrictive on the rights and prerogatives of the workers to minimize the higher costs. In some cases, we may have to schedule an employee who previously worked a regular 40-hour schedule for 20 regular hours of work a week in anticipation of emergency overtime costs.

Local governments basically face two options to respond to the imposition of the Fair Labor Standards Act: Increase taxes and/or decrease services. Unlike the Federal Government, we, fortunately, do not have the option to deficit-finance the problem so that our children would have to pay for our mismanagement.

The fact that widely different estimates of the impact of FLSA have been calculated by different cities relates to the different cities' abilities to absorb the higher costs through higher taxes. The city of Stillwater estimates that the total additional cost on the current year's budget will be approximately \$625,000, while the city of Ardmore has estimated the cost to be \$250,000. The great difference in estimates from two cities of slightly different populations is caused by two different factors.

First, the city of Stillwater provides ambulance and rescue services which are very significantly impacted by the Fair Labor Standards Act.

Second, the city of Ardmore has chosen to cut more service in response to the Fair Labor Standards Act. Nineteen full-time employees were eliminated in Ardmore's 1985-86 budget.

Some local governments face only one option: To decrease service. Carter County, in which Ardmore is located, had little or no ability to increase its revenue. The sheriff of Carter County could only provide him with \$10,000. The sheriff was told not to work any overtime regardless of the circumstances. We are now in a situation in Carter County that the sheriff cannot obtain the necessary assistance from his labor force regardless of the nature of an emergency. A sheriff's deputy who wants to respond to an emergency call after his normal shift out of professional obligation is prevented from doing so by the FLSA.

In 1984, Federal revenue sharing provided the city of Ardmore with \$704,000. In 1985, the *Garcia* decision will cost the city of Ardmore \$250,000 in overtime plus 19 full-time employees were eliminated. In 1986, the city of Ardmore will probably lose revenue sharing. The total impact of these actions, all of which were totally beyond our control, will be approximately \$1 million out of an \$8 million general operating budget.

Aid to local governments from the Federal Government is being removed to reduce the Federal deficit and to allow local governments to solve their own problems with their own resources. Local government's dependence on the Federal Government should be reduced. But at the same time, the Federal Government should stop telling local governments how to manage their affairs. Hence, local and State governments unanimously support efforts to amend the Fair Labor Standards Act.

Thank you.

Senator NICKLES. Thank you very much.

Our next panelists are Robert Allen and Roger Cutler.

Mr. CUTLER. Senator, I am honored to be here today to appear before this panel and share the 5 minutes that remain in this hearing with Mr. Allen. I will try to keep my comments within that period of time.

The matter before the committee is an issue of the most profound kind. It goes right to the heart of the Constitution; that is, is there any constitutional federalism remaining today? Is there anything reserved or left to the States and local government under the Congress' commerce power? A good deal has been said today about the Supreme Court; however, the ultimate issue presented is if Congress is going to exercise that commerce power to the full extent, as suggested to be legal by the *Garcia* decision?

We are faced with a serious constitutional dilemma, in this country, and that goes to the issue of whether State and local governments can perform their traditionally assigned roles without unreasonable Federal interference. Your bill goes a long way to permit local government to do its job, free of unnecessary Federal intrusion. Therefore, on behalf of my city and NIMLO, I am authorized to state that we would like to lend our support to the general provisions you have suggested in your proposed legislation.

Just briefly, the 1974 amendments to the Fair Labor Standards Act interferes with employees' rights. We are talking about the right to contract, the ability of the employees to have part-time jobs with the same employer without being worried about losing those jobs because of time-and-a-half pay requirements of the act. Also, as it has already been testified about earlier, we are talking about management prerogatives.

I categorize these in at least three areas: The disaster kinds of things while staying within budget appropriations. For example, it is important to be able to allocate the necessary resources in a flood, a natural disaster, a crime scene, on anything in that crisis nature, but then stay within the budget by requiring employees to take compensatory time off outside the timeframe of crises.

The second area would be those that are seasonal in nature. These include parks, but we also heard some testimony today about fish and game. In addition, there are many areas in the streets and

in other city departments that are seasonal in nature and that will not be predictable. Management flexibility is required so that they can be handled, but stay within budget appropriations.

The third category are those that are voluntary in nature. For example in Salt Lake, our people in waste treatment plants work 48 hours one week, 36 the next. They are paid 4 hours' overtime and they like this arrangement because it allows them, among other advantages, the opportunity to have 2- and 3-day weekends. The 1974 act will prohibit this practice because of its costly overtime provisions.

We believe the *Garcia* decision is unreasonable and that the full implementation of the 1974 amendments interferes, in an inappropriate way, with authority, municipalities' and States' power and authority, to manage their affairs. We support your proposed amendment and volunteer that if there is any help that we can give to assist in obtaining passage of your amendment, we would like to do so.

[The prepared statement of Mr. Cutler follows:]



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REPRESENTING

NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS

BEFORE

THE SENATE LABOR SUBCOMMITTEE OF

THE SENATE COMMITTEE ON LABOR AND LABOR AND HUMAN RESOURCES

SENATOR DON NICKELS, CHAIRMAN

CONCERNING

THE IMPACT OF THE UNITED STATES SUPREME COURT'S

DECISION IN GARCIA

UPON THE MUNICIPALITIES OF THE UNITED STATES

AUGUST 28, 1985

**NIMLO'S 50th
Anniversary**

Chairman Nickels and distinguished members of the Senate Labor Subcommittee, I am Roger F. Cutler, City Attorney of Salt Lake City, Utah. I am a Vice-President of the National Institute of Municipal Law Officers (NIMLO), a nonpartisan organization with a direct membership of 1800 municipalities. Appearing with me this morning on behalf of NIMLO is Robert D. Allen, Municipal Counselor, of Oklahoma City, Oklahoma.

NIMLO is operated by the chief legal counsel of member municipalities; therefore, our members have the responsibility for advising our municipal governments on how to comply with the Fair Labor Standards Act (FLSA). NIMLO members are acutely aware of the many problems resulting from the Garcia decision, and I am pleased to appear this morning on behalf of NIMLO to present testimony in support of legislation which would eliminate Fair Labor Standards Act coverage for most state and local government employees.

In 1976, in the case of National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court ruled that Congress could not constitutionally compel state and local governments to comply with the Fair Labor Standards Act for those governmental employees engaged in traditional and integral governmental functions. The Court properly reasoned that Congress' attempt to regulate the wages and hours of state and local government employees engaged in certain "core" functions (which only they can perform and which they pay for largely out of taxes they

impose on their residents) violated the "Federalism" principles embodied in our Constitution; thereby, the law impaired the ability of the political subdivision of state to function effectively in a federal system. The Court ruled that Congress could not exercise use of its power to regulate commerce so broadly as to force its particular choices regarding how essential decisions and policy, regarding the conduct of state and local governmental "traditional integral" functions, are to be made and effectuated.

Between 1976 and 1985, in a series of cases involving congressional regulation of state activities, it became increasingly clear that the Supreme Court was having difficulty in determining which state and local governmental functions were "traditional and integral" and, thus, immune from congressional control. Finally in the Garcia case, the Court expressly overruled the decision in National League of Cities v. Usery, insofar as it is based on judicial interpretations of governmental and proprietary functions.

However, rather than developing an appropriate test for determining the scope of state and local governmental immunity under the principles of constitutional federalism, in Garcia the Supreme Court abdicated its constitutional responsibility of determining how the Constitution should be interpreted; this role "to say what the law is" is one the Court has espoused, expressed and performed since Marbury v. Madison, 1 Cranch 137, 177

(1803). In our view, and most other legal observers, this decision is not properly one under the so-called "political action exception;" but, the Court's 5 to 4 decision seems to imply that congressional self-restraint is the only limitation placed on Congress, when it seeks to impose its will on state and local governments under the Commerce Clause.

However, in conflicting language, the Supreme Court also seemed to preserve the concept of a judicially monitored system of shared powers in a federalist system. It said on pages 25 and 27 of its slip opinion that it was deciding only the transit cases before it and stated:

"These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause." [p. 27 slip op. (underlining added)]

The Court then quoted Justice Frankfurter where he said, in part:

". . . nor need we go beyond what is required for a reasoned disposition of the controversy now before the Court . . ."

Thus, the inquiry in Garcia (even though it overruled Usery) centered on the controversy before the Court regarding transit workers and the Court's words are dictum as to other matters, subjects or functions of state and local government.

Former Solicitor General Rex W. Lee (who argued the U.S. Government's case, but argued against overruling Usery) has said that a credible case can be made, from a reading of the entire opinion, that there are reserved in federalism "islands," areas

where the Federal Constitution would not allow FLSA control of all local government actions. These areas of State and local government autonomy include public safety, fire, police and health services, where Federal action can unreasonably impact and limit reasonable state and local choices on such matters as tax policy, budget prioritization and fundamental government policy selection. He referred to certain key language in the Garcia decision, where the Court recognized a constitutional limit to congressional power; for example, on page 27 of the slip opinion the court stated:

"... of course, we continue to recognize that the States occupy a special and specific position in our constitutional system, and that the scope of Congress' authority under the commerce clause must reflect that position."

He, further, opined that states and cities should not "give up." Garcia should not be interpreted as saying that the area of Federal domination of state and local government under the commerce power is without constitutional limits, as being purely a political question as was formerly claimed with respect to legislative reapportionment before Baker v. Carr, 369 U.S. 45 (1962).

However, certain language in that opinion, when combined with the express overruling of Usery, lends itself to a broad reading and application. If such an interpretation is given full sway, it would render states and local governments mere serfs and subject to virtually unlimited federal domination through

exercise of its power to regulate commerce. Therefore, Garcia represents a challenge to our national constitutional system of shared power, with its system of checks and balances under the principle of Federalism, which cannot be ignored by the people, public officials or Congress.

At this time in our nation's history, the federal government is turning back more responsibilities to state and local governments; they are increasingly being asked to perform a myriad of governmental functions. This trend is healthy because state and local governments are closer to the people they serve; therefore, they are more responsive and accountable to the needs and desires of the Nation's citizenry, in many, if not all of the areas where this shift of responsibility is occurring. At the same time, however, it is also an era when the federal government is withdrawing many financial programs that provide aid and assistance to state and local government.

It, indeed, seems incongruous to acknowledge federalist principles by reassigning and allocating responsibility to local level, while withdrawing financial support, but at the same time implementing an eleven year old law (which has never been applied to "core" state and local governmental functions because it was ruled unconstitutional) and which law imposes inordinate financial and procedural impediments to this government's ability to perform the responsibilities assigned. If state and local governments are to exercise their assigned and constitutional

responsibilities properly, they must have the discretion and autonomy to exercise their authority, free from unnecessary and costly federal regulation.

The often extolled virtue assigned to state and local government is their role as being a "laboratory" to try approaches in solving societal problems in new, innovative and cost effective ways. This role is substantially frustrated by the federally imposed FLSA regulatory straight-jacket, which is inflexible to our local needs and conditions. The application of the Fair Labor Standards Act to state and local government employees engaged in "core" functions is unnecessary, costly and represents a direct threat to the independent existence of state and local governments. This fact is true because the Fair Labor Standard Act removes essential powers from elected and local governments to perform their important functions. Instead, it vests the federal government and Department of Labor with control over essential attributes of state and local sovereignty, autonomy and operations, which federal officials neither know much about nor have demonstrated much empathy for local needs.

In sum, while the Court's Garcia decision, as above quoted, states there are attributes of sovereignty attaching to state and local governments, which Congress cannot impair; however, the Court then abandoned its responsibility to act as a check on congressional overreaching. It is, therefore, incumbent on Congress itself to protect our system of federalism by preserving

in state and local governments those powers and autonomy which are essential to their continued existence and to the delivery of the health and public safety functions, only they provide.

It is a fair statement that no two states of this Union and no two, of the 83,000 local jurisdictions, have the same needs or circumstances. Variety is a fact of life in the United States, and one of the most overriding and net effects of the Fair Labor Standards Act's application to state and local government will be its standardization of state and local employment conditions and practices, inspite of this variety and diversity. In the process it will impose billions of additional costs, without any benefit to an overburdened taxpaying public.

Illustrative of the horrendous financial burden imposed by the Act's application to state and local government is Los Angeles, California. This major metropolitan area has estimated that its annual cost of compliance will be \$100 million per year. Similarly, Austin, Texas estimates its costs at \$1.5 million annually. My own jurisdiction, Salt Lake City, estimates that its costs will be in excess of \$2 million per year. Stillwater, Oklahoma estimates its annual cost of compliance to be \$100,000. Mr. Allen will present the costs of application of FLSA to Oklahoma City.

NIMLO is currently surveying all of its 1800 members on the total cost of compliance for local governments. So far, NIMLO has received reports on costs from 337 local governments. These

initial responses state that the cost of complying with the Fair Labor Standard Act and its regulations will cost at least \$376,314,437. However, most respondents to the questionnaire, attached for the committee's convenient reference, report that the act and regulations are so complicated and so attuned to private industry that they cannot fully estimate the total cost of compliance. Thus, the \$276 million statement is mostly, limited to overtime for employees working in police, fire, schools, health and safety functions.

Thus, even though our survey has not yet been completed, these preliminary figures indicate that the total cost of compliance for all levels of government will be in the billions of dollars. This figure, of course, does not include the millions or billions of additional costs that the Department of Labor will incur to extend their regulatory arm over state and local governments. Collaterally (as a note on a related, but different subject of the burgeoning federal deficit), one must also inquire as to why Congress should add to the federal deficit the cost of the thousands of new federal employees and attendant administrative costs necessary for the Department of Labor to staff up its bureaucratic machinery to regulate some 9,000,000 state and local employees in the approximately 83,000 jurisdictions across this country. The cost to the taxpayers of this country to implement this law is staggering.

Illustrative of the type of costs and analysis required

under the FLSA are the reports of Salt Lake City and Baltimore; copies of which are attached as exhibits to this written statement. NIMLO is still receiving additional reports with every day's mail and should soon have reports from nearly all of its 1800 member jurisdictions. We will be pleased to provide full copies and summaries of these reports to this committee. We will also provide them to the Department of Labor (pursuant to their recent request) who, interestingly, have reported to NIMLO staff that they have compiled no cost figures on the Act's present cost impact on state and local government; further, they have refused to provide to us the cost or number of employees they must employ to perform their function with regard to assuring and monitoring compliance by state and local government.

Of, further, interests with regard to the impact on state and local government of the Act, as interpreted by the Department of Labor, are the responses from local governments on how compliance and financial burdens would be met. Of the 332 jurisdictions, to date responding to the NIMLO questionnaire on how compliance would be obtained, 130 stated they would reduce services to their citizens. 94 jurisdictions report they would be able to raise money through increased taxation. 74 anticipate laying off employees and 37 indicate they would restrict or abandon seasonal hiring. 12 jurisdictions state they would increase user fees and only 6 jurisdictions would consider

reducing part-time staff and hiring a larger full-time staff. 8 jurisdictions would choose to reduce pay and/or reduce the number of hours worked. Only two jurisdictions indicated they would opt to borrow money, rather than reduce services or raise taxes.

Miscellaneous other methods of compliance were stated, including reorganizing work schedules and contracting-out work to the private sector; thus, giving private employers the burden of any overtime payments. Also, mentioned was freezing new hiring, reducing total overtime expenditures to employees by outlawing certain overtime practices and awarding more overtime work to exempt employees. In addition, some would prohibit current employees from accepting a second part-time job and eliminate any compensation for costs to volunteers on fire calls. 40 jurisdictions responded that compliance with the minimum overtime requirements could be "managed" within their existing budgets; however, many of these jurisdictions would be required to use funds designated solely for emergency or contingencies.

Importantly, many frustrated jurisdictions responded that it was unknown how they would finance FLSA compliance. More significantly, 99 jurisdictions (almost a quarter of the total reporting thus far) stated that they could not even anticipate the cost of recordkeeping and other administrative costs to assure full compliance with the Act, since the current Fair Labor Standards Act was designed for private not public sector employers.

Faced with these burgeoning costs, it should be specifically noted that the increased burden imposed on local taxpayers by the Fair Labor Standards Act will result in no increase or improvement of local services. These federally imposed increased costs will be incurred merely to maintain the present level of services provided to our taxpayers and will not result in any benefit whatsoever to our citizenry.

State and local governments are being forced to pay these additional costs at a time when they are least able to afford it. The proposals to reduce or eliminate General Revenue Sharing, UDAG, CDBG, and other grant programs will obviously severely limit discretionary spending at the local level. Proposals to eliminate the federal tax deduction for state and local taxes threatens to erode our tax base, and there has (for several years) been an ongoing assault on the tax free aspects of municipal bonds. If the federal government desires state and local governments to carry out increased responsibilities, then these governments must have the authority to allocate their own financial resources as they see fit.

The net effect of the Act, as interpreted by the Department of Labor, is that it imposes astounding financial costs and allows the federal government to control the budgets of state and local governments. The costs imposed by the Act forces local governments to allocate increased tax dollars into those areas where the FLSA increases their expenses, leaving fewer dollars

for other areas. Furthermore, increased costs are not the only adverse effects which compliance with the Fair Labor Standards Act will have on state and local governments and the citizens they serve. The very independent existence of state and local governments is threatened when the federal government acts to allocate state and local tax dollars.

Few would doubt that the most basic responsibility of local governments is public health and safety. Providing police, fire, health and other safety protection is almost a purely local concern, yet the federal Fair Labor Standards Act severely hampers the ability of local governments to provide this most basic service to local citizens. Our survey indicates that, by far, the largest increased costs are in the areas of police, fire, health and safety protection services. These increased costs will undoubtedly result in lesser public safety services.

For example, prior to Garcia, most departments awarded compensatory time-off to employees required to work overtime. It has been our experience in Salt Lake City, and I am sure in almost all other municipalities, that many public employees prefer the system of awarding so-called "comp. time" in lieu of overtime monetary payments. The Fair Labor Standards Act effectively bars this practice and requires the cash payment for overtime. Because of this, like any private business faced with this problem, will cut back on overtime to stay within budgets; this benefits neither the government entity, its employees, nor

its citizens. It will likely result in reduced public safety protection, at a time when taxpayers are demanding increases in such services.

Equally important, it eliminates the flexibility of state and local government to respond to an emergency or disaster, but stay within a budget by curtailing other non-essential work. Government is not a private profit/loss enterprise; its most fundamental purpose is to respond to the life, safety and health needs of its citizens, who are correspondingly dependent upon government to provide this protection to them. Yet, it must meet exigent circumstances within budgeted revenues. These situations demand budget and operational flexibility.

For example, at a significant crime scene, police must keep staff at the location until all leads are exhausted. During a disaster (such as the recently nationally televised flooding in Salt Lake), personnel cannot watch a clock and leave the scene at dinner bells or at 5:00 o'clock. The havoc and risk caused following massive power outages, fires or crippling storms must be met, regardless of a time clock. Thus, governments mostly do not have the luxury of performing its most essential services in a manner that minimizes or avoids overtime; therefore, state and local government must have the management flexibility to work crews, yet elect (under the terms of their labor agreements) to give compensatory time-off and, thereby, forego to delay non-essential work in order to stay within budgets or tax revenues.

Even outside the disaster crisis area of management, there are many local conditions which require flexibility for the local government to address problems. For example, in Salt Lake City, employees in the park and recreation department, water department and snow removal crews often log many overtime hours during the summer or winter, for which compensatory time off is (by mutual written agreement with employees) awarded in the off-season. The FLSA prohibits Salt Lake from continuing this longstanding practice, despite the fact that the government, its citizens and employees all approve, see the need for and desire this system.

Instead, the City must now pay these employees premium overtime payments for hours worked in excess of forty hours, with the prospect of a lay-off of employees during the slack months; terminating some full-time employees, in favor of unskilled or less trained seasonal workers; or paying the required overtime cash payments and burdening the taxpayers with paying specialized employees, during unproductive off-season periods, for "make-work" projects at regular rates of pay.

A similar situation occurs in the public safety area. Springtime flooding, summertime fires, wintertime snow, and tourist seasons often require public safety officers, street crews and others to work for extended periods of time during particular seasons of the year, even though these situations may not reach crisis or a disaster category. The common practice in our city and many others has been to award compensatory time-off

for overtime work, with employee concurrence, which time could then be used by the employees during the slack season. Because of Garcia this practice is no longer allowed and overtime wages must be paid for time worked in excess of the statutory minimum.

Thus, local governments, in many instances, may have to cut many services or special operating situations to the bare minimum, when sound public administration would dictate otherwise. It is respectfully suggested that when dealing with such emergency or other local situations, the focus should be on providing adequate protection and service levels to the citizenry, rather than the blind worship of federal regulations.

The present congressional mandate, as interpreted by the Supreme Court and coupled with the threat of Department of Labor enforcement, denies the necessary budget and management prerogatives necessary for the frontline force, charged with initially meeting emergency and disaster situations, the necessary flexibility to deal responsibly with them. Further, it is not sound public policy for the federal government to prohibit an employment practice which has been accepted for decades by both local employees and local government employees.

I am furnishing the sub-committee with affidavits of officials of labor union officials, with whom Salt Lake City has labor agreements. They state, unequivocally, that they and the

city employees they represent want to keep the current "comp. time" system they now have; they do not want FLSA applied to them. Other union organizations in Salt Lake have similarly expressed agreement, but were unable to sign affidavits, merely because they were under extreme pressure from national unions with which they affiliated. I was informed that they wish to press for further congressional interference over state and local government by obtaining a national collective bargaining law under the aegis of the Garcia rationale. In short, the will and desire of the local rank and file employee is being subordinated, in the hope of further centralizing of influence and control over local affairs in Washington.

It must also be noted that application of the Fair Labor Standards Act to state and local government will likely cause many public safety officers to be less trained than was the case prior to Garcia. The Act requires overtime payment for the time spent at police academy programs, for hours of training in excess of the statutory maximum. For example, prior to the decision in National League of Cities v. Usery, the State of California reduced by 1/2 the number of hours spent in training by highway patrolmen in order to reduce overtime costs. We can expect similar reductions in training programs as a result of the Garcia decision.

In addition, because of the rules concerning pay during out-of-state travel, it can reasonably be anticipated that rank and

file employees will be given fewer chances to attend national seminars and training sessions. These trips are not only beneficial to the public, but are often viewed as a "perk" where an employee gets some out-of-state travel and a chance for career advancement at government expense. The government and the public benefit by increased efficiency and skills; however, because of the costs imposed by FLSA compliance, this present employee and public benefit will likely be curtailed. Such seminar training will most likely be diverted to exempt employees or significantly limited.

Similarly, time spent by a peace officers in court as witnesses has historically been compensated, either at the regular rate of pay, with compensatory time off or (as in the case in Salt Lake) by pay a formula negotiated with the employees' union.¹ A large portion of the officers' time is

¹Salt Lake's collectively bargained contract with the police pays an officer a flat rate of three hours regular pay for misdemeanor trials and four for felonies, regardless of the time actually spent unless an unusually long trial dictates that a cash payment or additional compensatory time-off should be awarded. This process advantages the city budgeting process because the annual number of cases each year are felt to be more predictable than the hours required for trial. Also, it advantages the prosecution because off-duty police officers will voluntarily appear on a misdemeanor trial (because of the pay incentive of the flat rate) whereas they often failed to appear, without threat and imposition of administrative sanctions, when they were only likely to get paid for part of an hour's pay for attendance if the case happened to be settled. More significantly, this arrangement was negotiated with the police union for its perceived benefits to the employees. FLSA's philosophy is to pay time and on-half for overtime hours worked and is at odds with (footnote continued)

often spent waiting to testify. Because time spent in court, under the FLSA, must now be treated as "hours worked" for purposes of determining overtime entitlement, municipalities will often be forced to cut back on the amount of time police officers are on the street, in order to keep the total number of hours worked by such officers below the statutory limit. Alternatively, they will have to increase budgets, and slavishly adhere to a compensation plan dictated by the federal government, which is contrary to the needs and the will of the officers themselves. Several cities have reported that they will increase plea bargaining in criminal trials because of the costs involved with using police as witnesses. Again, it is the taxpayers who will suffer from the reduced police protection and prosecution compromises, brought about by mandatory FLSA coverage.

The Fair Labor Standards Act will have other impacts on local public safety services. Many municipalities require police officers and other critical crews to be "on-call" for specified periods of time during potential crises such as impending storms. Under the FLSA, officers must be compensated at time and one-half for time spent "on-call" when such time, coupled with the employees' regular hours of work, exceeds the statutory maximum. This fact is true even if the employees are never

this program. This program, perhaps, could be maintained, but the dual accounting and compliance justification required by the Act places it in jeopardy, contrary to the desires of all concerned.

called to duty and even though present salaries were negotiated and set in light of this responsibility. The result of this practice will be that municipalities will have fewer employees "on-call" at any given time to deal with emergency situations.

Also, it must be noted it will often result in a federally mandated windfall to employees. Since FLSA was adopted during the depression and for almost a decade since Usery (but before Garcia) state and local governments have negotiated, bargained, and set salaries and wages, in consideration of the working conditions in each locality. Some of the flexibility and local work rules, together with the mutually understood expectation of call-back and hours worked were negotiated in the salary.

Illustrative of such a process is a common situation nationally, but exemplified by Salt Lake City firefighters. They have negotiated a 56 hour work week, whereby they work 24 hour shifts and during which time they eat and sleep at the job site. Under FLSA any hours over 53 hours per week are computed as overtime and employees are entitled to time and one-half compensation. Thus, without the benefit of warning or even the original phase-in period initially codified in the Act, new rules and requirements of overtime pay are imposed by the FLSA. The new pay rules use, as a base rate, those wage and salary schedules which are significantly higher than minimum wage rates and which were negotiated to compensate employees for those 56 hours and working conditions; the new rules now require payment

of overtime for approximately 3 hours per week. The net effect of unilaterally imposing these overtime rules is that, in many instances, they result in additional pay for services which employees are already fully compensated under negotiated agreements.

The surprise application of the Act constitutes a raid on the local treasury and a double payment to many employees at the largess of the federal government, who (incidentally) has no obligation to pay the bill. It is hard to justify to strapped local taxpayers why significant additional dollars should be paid, for example, to a firefighter who is earning equivalent hourly rates well in excess of the average taxpayer and approaching \$20 per hour for work time already compensated for, under existing collective bargaining agreements. These are simply windfall double payments dictated by unjustified overreaching and interference of the federal government.²

²The City of Los Angeles has filed litigation attempting to enjoin the application of the Act, in part, based on the Department of Labor's failure to interpret the Act as originally intended by Congress to provide a phase-in and adjustment period. It points out that the wages, salaries and conditions of employment cost the county in excess of \$12 billion per month in salaries and benefits. They were given reliance on the Usery Supreme Court decision which exempted them from the Act. The county would not have agreed to the salaries and benefit package if they had known FLSA would be superimposed on them. Those costs would have been factored into the salary and benefit and working condition package. City of Los Angeles v. William E. Brock, et al., United States District Court, Central District of California Case No. CV85-5341-MRP(JRX).

Mr. Chairman, there is one other area I would like to discuss briefly this morning, and that is the use of volunteers. Many municipalities utilize the services of volunteers as firefighters. In recognition of services rendered, volunteers are often paid a small amount of compensation. Under the FLSA, if the payments made to the volunteers exceeds the volunteers' actual out-of-pocket expenses, then the volunteers must be treated as paid employees and be given the minimum wage and, when applicable, overtime. If individuals are willing to donate their services to the public, the FLSA should not bar them from doing so. We do not believe that the federal government should stand in the way of municipalities desiring to utilize the services of these volunteers, but the FLSA forces local governments to choose between stopping stipend payments to volunteers or doing away with volunteer services.

A similar problem has arisen in Salt Lake City. We utilize the services of elderly people as school crossing guards on a part-time basis. These employees are paid a set rate of \$285.00 per month. They work an average of 100 hours per month. Under the FLSA their hourly rate would have to be raised from \$2.85 per hour to \$3.35 per hour. This would not only cause an increased budgetary cost to the police department of \$40,000, but would affect the social security payments of the persons employed as guards. The current rate is calculated so that their social security is not affected by this employment.

1

Mr. Chairman, I have tried to outline a very few of the many problems state and local governments are having as a result of the Garcia decision. The Garcia decision will cause increased local taxes and a decrease in the quality and quantity of essential public services. The Garcia decision threatens the independent sovereignty of state and local governments and involves the Federal Government in matters best left to those governments closest to the people they serve.

NIMLO urges Congress to accept the Supreme Court's constitutional challenge and interpret the Constitution's Federalism principles as exempting state and local governments from coverage under the Fair Labor Standards Act.

cm114

AFFIDAVIT OF DENNIS THAYNE, PRESIDENT OF
WESTERN ALLIANCE OF GOVERNMENT EMPLOYEES, (WAGE)

RE: FAIR LABOR STANDARD ACT

STATE OF UTAH)
) ss.
County of Salt Lake)

COMES NOW, Dennis Thayne, who, being first duly sworn upon oath, deposes and says as follows:

1. He is the duly elected and acting president of the Western Alliance of State, County and Municipal Employees (WASCME), a subdivision of WAGE and Local 840 is the labor organization designated and recognized by the City of Salt Lake as a duly authorized exclusive bargaining representative for clerical employees of Salt Lake City.

2. WAGE represents all clerical employees hired by the City, except executive and administrative personnel. Said unit represents approximately 26% of the employees of Salt Lake City who are not supervisory, professional or executive level employees. WAGE represents over 1200 public employees in the State of Utah; they, also, have approximately 100 police officers in Salt Lake City who are members of their organization, but who are officially represented by the recognized bargaining agent, Salt Lake Police Association.

3. As part of their duties, the members of WAGE have the obligation to provide all clerical services for the various

offices within the City, including the clerks employed and utilized by the Police and Fire Departments within the City.

4. Members of WAGE are committed to providing a high quality level of service at reasonable cost to the citizens and taxpayers of Salt Lake City, consistent with receiving fair and equitable compensation and, also, safe and appropriate working conditions. As a part of those objectives, the union has negotiated with the City in mutual good faith for collective bargaining agreements.

5. As a part of the negotiated agreements between the City and WAGE (consistent with the policies and procedures of City Administration), we have developed a system for awarding and paying overtime. Included in this procedure is a program for awarding compensatory time off at time and a half for the overtime hours worked, but which time is awarded as time off on a mutually convenient basis to the City and the employee. In Affiant's opinion, these relationships are compatible with the public interest, the budgetary limitations of the City and in the interests of the individual employee.

6. Affiant has been informed that the recent United States Supreme Court case entitled Garcia v. San Antonio Metropolitan Transit Authority, 53 Law Week 4147, decided February 19, 1985, which case overruled the previous Usery decision and, potentially, made or may result in municipal operations being under the full ambit of the Federal Fair Labor Standards Act. Although no

person is paid below the minimum wage provisions of that Act, the Labor Department regulations and the Act, if made fully applicable to our functions, would materially affect the present working relationships between personnel of our bargaining unit and Salt Lake City; it would, also, materially disadvantage our membership in the present beneficial and mutually agreed to procedures.

7. Although precise economic impacts have not been analyzed by Affiant, it is Affiant's opinion from past negotiations that implementing the provisions of the Fair Labor Standards Act on our membership as now applicable to the private sector would have material adverse impact on the financial ability of the City to provide police protection and other services in the City. It would have the immediate impact of increasing costs and/or decreasing the level of services, while at the same time disadvantaging our membership in several important aspects, including the right to accumulate compensatory time off to be used at the most convenient time for that employee's personal desires.

8. It is our expressed desire that through administrative regulation, judicial action, or preferably legislative amendment, the Labor Statute be amended to provide that its provisions could be superseded by a mutually negotiated collective bargaining agreement between the employing entity and a bargaining unit.

DATED this 24 day of April, 1985.

WESTERN ALLIANCE OF
GOVERNMENT EMPLOYEES (WAGE)

Dennis Thayne
DENNIS THAYNE, President

SUBSCRIBED AND SWORN to before me this 24 day of

April, 1985.

R. M. H.
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:

March 1, 1989

rc9

AFFIDAVIT OF ELDON TANNER, PRESIDENT OF
SALT LAKE POLICE ASSOCIATION (SLPA)

RE: FAIR LABOR STANDARD ACT

STATE OF UTAH)
) ss.
County of Salt Lake)
)

COMES NOW, Eldon Tanner, who, being first duly sworn upon oath, deposes and says as follows:

1. He is the duly elected and acting president of the Salt Lake Police Association (SLPA), a labor organization designated and recognized by the City of Salt Lake as a duly authorized exclusive bargaining representative for the sworn police officers employed by Salt Lake City.

2. SLPA represents all police officers hired by the City, except executive and administrative personnel above the rank of sergeant. Said unit represents approximately 18% of the employees of Salt Lake City who are not supervisory, professional or executive level employees.

3. As part of their sworn duties, City police officers have the obligation to protect the peace, safety, welfare and security of the residents, visitors and businesses located within the corporate limits of the City. They have the obligation to enforce local and state law on all levels, including felony and capital homicide statutes. They provide security for Utah's only inter-

national airport and; otherwise, protect and defend the rights of the citizens, residents and visitors of this area.

4. Members of SLPA are committed to providing a high quality level of police protection at reasonable cost to the citizens and taxpayers of Salt Lake City, consistent with receiving fair and equitable compensation and, also, safe and appropriate working conditions. As a part of those objectives, the union has negotiated with the City in mutual good faith for collective bargaining agreements.

5. As a part of the negotiated agreements between the City and Police Union (coupled with the policies and procedures of City Administration), we have developed a system for awarding and paying overtime. Included in this procedure is a program for "constant manning" whereby officers can volunteer for special assignments for overtime at their regular base salary. Also developed is a program for officers signing up for work as security personnel at the Salt Lake International Airport at first grade patrolman's base salary rate; in addition, there are other special work opportunities, such as monitoring parking meter collections, and providing court security, which are similarly handled on a voluntary straight time basis. These voluntary extra hours are not computed as overtime for the purpose of awarding time and a half compensation. However, other overtime, required by management, is compensated at time and a half rates, either in cash or by awarding compensable time-off

at mutually convenient times to the employee and the employer. In Affiant's opinion, these relationships are compatible with the public interest, the budgetary limitations of the City and in the interests of the individual employee.

6. Affiant has been informed that the recent United States Supreme Court case entitled Garcia v. San Antonio Metropolitan Transit Authority, 53 Law Week 4147, decided February 19, 1985, which case overruled the previous Usery decision and, potentially, made or may result in municipal operations being under the full ambit of the Federal Fair Labor Standards Act. Although no person is paid below the minimum wage provisions of that Act, the Labor Department regulations and the Act, if made fully applicable to police functions, would materially affect the present working relationships between police personnel of our bargaining unit and Salt Lake City; it would, also, materially disadvantage our membership in the present beneficial and mutually agreed to procedures.

7. Although precise economic impacts have not been analyzed by Affiant, it is Affiant's opinion from past negotiations that implementing the provisions of the Fair Labor Standards Act on our membership as now applicable to the private sector would have material adverse impact on the financial ability of the City to provide police protection and other services in the City. It would have the immediate impact of increasing costs and/or decreasing the level of services, while at the same time disadvantaging our membership in several important aspects, including the

right to accumulate compensatory time off to be used at the most convenient time for that employee's personal desires.

8. After presenting this matter to our Executive Board, it is the will and desire of our labor association to oppose the implementation of the Fair Labor Standards Act to our membership. It is our expressed desire that through administrative regulation, judicial action or (preferably) legislative amendment that the Fair Labor Standards Act to be made inapplicable to local government, specifically including Salt Lake City and our membership. The public and our memberships ability to influence the State Legislature and local legislative action are adequate to protect our interests, without intervention of the federal government in these matters.

DATED this 25 day of April, 1985.

SALT LAKE POLICE ASSOCIATION

Eldon L. Tanner
ELDON TANNER, President

SUBSCRIBED AND SWORN to before me this 25th day of

April, 1985.

[Signature]
NOTARY PUBLIC, residing in
Salt Lake County, Utah

My Commission Expires:

March 1, 1987

rc9

IMPLICATIONS OF F.L.S.A. RULING ON DEPARTMENTS
OF SALT LAKE CITY CORPORATION

PRELIMINARY

POLICE DEPARTMENT

DRAFT

The police department performs a variety of duties in the city besides law enforcement at contracted rates or straight time hourly rates after forty hours of work a week. The FLSA would cause a significant cost increase in the budget of the police department to adhere to the regulations as they affect law enforcement personnel. All clerical and support personnel are currently paid over time at the time and one-half rate. The FLSA would not affect their operation. There are 487 employees in this unit.

Sworn Officers

Court Time is paid per contract according to offense a set number of hours. Implications of the FLSA would be to pay officers time and one-half for all hours in court that they are not on duty.

COSTS: Current cost of court time for the police department per year is \$200,00.00. Under the FLSA the estimated cost of court time would be \$206,000.00. The difference is estimated at \$6,000.00 additionally per year.

Parking Meter collections are paid at a set rate of \$11.75 per hour. Under the FLSA this would be paid at time and one-half for all hours worked in excess of forty hours per week.

COSTS: The current cost of parking meter collections is \$59,267.00 per year. The cost under the FLSA is estimated at \$93,213.12 per year. The additional cost is estimated at \$33,946.12 per year.

Constant Manning is currently paid at straight time rates to officers who request to work additional shifts. Under the FLSA these shifts would have to be paid at time and one-half.

COSTS: The current cost of constant manning is \$71,776.32 per year. Under the FLSA the cost is estimated at \$107,664.48 per year. The additional cost incurred by the department would be \$35,888.16 per year.

School Crossing Guards: These employees are paid a set rate of \$285.00 per month. They work an average of 100 hours per month. Under the FLSA their hourly rate would have to be raised from \$2.85 per hour to \$3.35 per hour. This would not only cause an increased budgetary cost to the department but would affect the social security payments of the persons employed as guards. The current rate is calculated so that their social security is not affected by this employment.

COSTS: Eighty seven persons work 100 hours a month for \$285.00. For a total yearly cost of \$223,155.00. Under the FLSA the cost would rise to \$335.00 per month for a total yearly cost of \$262,305.00. This would be an additional cost of \$39,150.00 per year.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE POLICE DEPARTMENT WOULD BE: \$114,984.28

PREFLIMINARY

DRAFT

FIRE DEPARTMENT

This department would incur excessive costs if not exempted from the FLSA. They not only have employees that exceed the guidelines but have a constant manning program and comp time program to stem the cost of paying overtime the their employees. There are currently 363 employees in this department.

Combat Division: The workforce of 224 non-exempt firefighters work a 56 hour work week.

The implications of the FLSA would be to pay them three hours of overtime a week, per person, fifty two weeks per year.

COSTS: The total number of additional hours is estimated at 52,416 at a cost of \$694,512.00 per year.

Communication Division: This division has a dispatch unit that works twelve hour shifts. They currently average the hours worked over a two week period to cut down on the overtime costs. They would have to pay an additional four hours of over time every other week under the FLSA. There are also other employees of this division that accrue comp time.

COSTS: The additional hours currently non-paid for this division are 433.25 per year. The additional cost would be estimated at \$4,631.44. These are all non-exempt employees.

Constant Manning: Firefighters are allowed by union contract to work extra shifts at straight time to fill in for sick and vacationing employees. These are mainly non-exempt employees.

Implications of the FLSA would be to pay these employees at overtime rates of time and one/half instead of straight time rates as agreed to in union contracts.

COSTS: Current payroll for constant manning per year is \$444,702.00. Under the FLSA the cost would be estimated at \$667,053.00. The net difference would be \$222,351.00 additionally per year.

Other Comp Time: The combat unit on a regular basis accrues approximately 2,865 hours of comp time per year. Other employees of the department accrue 271.76 hours of comp time per year.

COSTS: The current non-paid comp time would add an increased cost to the department of \$40,866.36 per year.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE FIRE DEPARTMENT WOULD BE: \$962,360.80

PRELIMINARY

DRAFT

ADMINISTRATIVE SERVICES DEPARTMENT

The department of administrative services has a varied number of divisions which use comp time as a way of reducing overtime budget costs. The effect of the FLSA will have a heavy effect on these divisions in gross dollars allocated for personnel costs. There are 168 employees in this department.

Facility Services generally pays for over time at the time and one-half rate. They do however, award comp hours during the year at the employees request. Under the FLSA these hours would have to be paid over time.

COSTS: The division gives about 615.2 hours of comp time per year. Under the FLSA the cost of paying them in over time would amount to \$5,721.36 per year.

City Recorder awards comp time for attendance at City Council meetings and other after work events. She does however pay over time when her employees work a City election. Under the FLSA these non-paid comp time hours would have to be paid over time.

COSTS: Exempt employees earn 127 hours per year in comp time. This amounts to \$1,822.45 per year. Non exempt employees earn 220 hours of comp time per year. This amounts to \$1,790.80 per year.

Data Processing generally pays for overtime hours, however they do give a significant number of comp hours to employees. These would have to also be paid over time hours under the FLSA.

COSTS: Employees earn about 1662 hours of comp time per year. This amounts to an additional cost to the division of \$19,711.32 per year.

Animal Control works standard eight hour shifts. They do as other divisions, award comp time to mediate the over time costs. These would have to be paid over time under FLSA.

COSTS: Employees of this division earn about 176 hours of comp time per year. This amounts to an additional cost to the division of \$1,636.80 per year.

Fleet Management pays most of their over time. They do award comp time to employees who prefer it. They work regular eight hour shifts in this division.

COSTS: Employees of this division earn about 1098 hours of comp time per year. This amounts to an additional cost to the division of \$10,211.40 per year.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE DEPARTMENT OF ADMINISTRATIVE SERVICES WOULD BE: \$40,894.13

PRELIMINARY

DRAFT

DEVELOPMENTAL SERVICES

The department of developmental services currently awards comp time to employees who work over 40 hours a week. The employees of this department work a substantial number of night meetings where they meet with citizen groups and the council to discuss planning, zoning, building inspection, and other property development issues. The FLSA ruling would have a fairly significant impact on this rather small City department. There are 60 employees in this department.

Exempt employees of the department currently accrue 1531.5 hours of comp time per year.

COSTS: The cost of paying over time at time and one-half to these employees is estimated at \$34,045.25 per year.

Non Exempt employees of the department currently accrue 758.75 hours of comp time per year.

COSTS: The cost of paying over time at time and one-half to these employees is estimated at \$9,264.34 per year.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE DEPARTMENT OF DEVELOPMENTAL SERVICES WOULD BE: \$43,309.59

PRELIMINARY

 DRAFT

PARKS & RECREATION DEPARTMENT

This department would be one of the most severely affected by the FLSA ruling considering its size and impact on the recreation habits of the general public. They use comp time in a variety of ways to cut down on their overtime budget which currently stands at 8,011 hours per year. This department has 99 employees on staff.

Golf Courses: They have 17 employees that accumulate 40 hours of comp time per pay period during the golf season. These employees take the comp time off in the winter months. These persons would all be classified as non-exempt.

Implications of the FLSA would be to pay these employees at time and one-half for all hours worked in excess of 40 hours a week and lay them off each winter when the golf courses are closed.

Maintenance, Recreation, Cemetery, Office: Employees of these divisions accrue varying amounts of comp time from minimal to as much as 50 hours per month during the summer months.

Implications of the FLSA would be to pay these employees at time and one-half for all hours earned over 40 hours per week.

Costs: The total number of additional hours currently non-paid would total 171 for exempt employees at a cost of \$2,534.22 per year, and 9,302.5 for non-exempt employees at a cost of \$86,513.25 per year. Additionally the department would incur substantial costs for unemployment insurance when they lay off the employees that currently use comp time hours in the winter when the recreation period is over.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE PARKS AND RECREATION DEPARTMENT WOULD BE: \$89,074.47

PRELIMINARY DRAFT

AIRPORT AUTHORITY

The Airport Authority has three major areas where the FLSA would have impact on their operation. Two of them are fairly minimal and one has a severe cost repercussion. There are 174 employees in this department.

Security at the Airport is paid at a contracted rate of \$11.75 per hour to City police officers. Under the FLSA the cost would be time and one-half for all hours worked.

COSTS: The current cost is \$188,000.00 per year. The cost at the over time rate is estimated at \$394,200.00 per year. This would be an additional cost of \$206,200.00 per year.

Maintenance Division currently allows employees to accrue up to 16 hours of comp time per year per employee. Under the FLSA these additional hours would have to be paid at time and one-half.

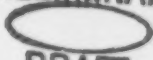
COSTS: It is estimated an additional 700 hours of comp time would have to be paid as over time under FLSA. This would be an additional cost of \$10,500.00 per year.

Engineering Division currently allows employees to accrue up to 200 hours of comp time during the construction season. These hours are taken off during the winter months when the construction slows down. Under the FLSA the employees would have to be paid over time at time and one-half and the staff would have to be reduced during the winter months. This would incur additional costs for unemployment insurance.

COSTS: It is estimated an additional 1500 hours of comp time would have to be paid as over time under FLSA. This would be an additional cost of \$24,000.00 per year. In addition unemployment insurance costs would go up during the winter months each year.

CRASH FIRE RESCUE costs would increase under the FLSA. The Airport Authority reimburses the City for costs to run a fully staffed Fire Station with paramedic support. As the costs for fire fighting rise under the FLSA the cost to the Airport to pay for this service would rise in like amount.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE AIRPORT AUTHORITY WOULD BE: \$240,700.00

PRELIMINARY

 DRAFT

DEPARTMENT OF PUBLIC UTILITIES

This department keeps its comp time hours awarded low and prefers to pay employees for earned overtime. The application of FLSA to their general work routine would be minimal. There are 371 employees in this department.

The department does have some unique working conditions that would be severely affected by the FLSA ruling as follows:

Sewer Division: They have four shifts of twelve hours each. There are eight employees per shift. Every other week they work 48 hours. Every other week they work 36 hours. These would be classified as non-exempt employees under FLSA.

The implications of FLSA would be to pay these employees for 36 hours every other week and for 40 hours of straight time and 8 hours of overtime every other week.

Treatment Plants: They have ten employees working twelve hour shifts. Every other week they work 48 hours. Every other week they work 36 hours. These persons are all classified as non-exempt.

The implications of FLSA would be the same as the sewer division.

COSTS: The total number of additional hours currently non-paid would total 6,656 for these divisions. The total cost of these additional hours would be \$92,851.20 per year.

Water Production/Stream Flow: They have three employees that currently log excess hours in the summer and take comp time off in the winter. These persons are all non-exempt.

The implications of FLSA would be to pay these persons overtime in the summer and lay them off in the winter.

COSTS: The estimated cost of paying the overtime to these employees above their normal salaries if kept on the payroll in the winter would be \$2,700.00 per year. The department would also incur additional costs for paying these persons unemployment insurance during the winter months.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE DEPARTMENT OF PUBLIC UTILITIES WOULD BE: \$95,551.20

PRELIMINARY

DRAFT

PUBLIC WORKS DEPARTMENT

This department is made up of three major divisions that have no unusual work shifts but works a substantial amount of overtime during the winter months for snow removal and summer months when the construction season is at its peak. They use comp time as a way to keep the high overtime costs as low as possible. There are 250 employees in this department. Under the FLSA ruling their overtime budgets would increase as follows:

Streets and Sanitation: This division handles refuse collection, snow removal, drainage systems, streets repairs, etc. Most of the employees who earn over time are non exempt under FLSA definitions.

COSTS: This division would have to increase their over time hours paid by 8,200.50 at a cost estimated to be an additional \$80,912.94 per year.

Transportation Engineering: This division is responsible for parking enforcement, street traffic signals and signing, street striping, traffic flow and study patterns, etc. They have regular work shifts and award comp time to employees who work more than 40 hours a week.

COSTS: This division would have to increase their paid over time hours by 2,007.50 under the FLSA at an estimated cost of \$20,013.50 additionally per year.

Engineering: This division is responsible for surveying, approval of all construction plans, roads, drainage, streets, and other design in the City. They were instrumental in the City averting a major disaster during the flooding of 1983 and 1984 with their expertise in planning alternate routes for water to flow from the canyons that surround the City. They generally have regular work shifts and use comp time to alleviate the over time budget.

COSTS: This division would have to increase their paid over time hours by 2,583.5 at an additional cost estimated to be \$14,057.54 per year.

TOTAL ADDITIONAL COSTS INCURRED UNDER THE FLSA FOR THE PUBLIC WORKS DEPARTMENT
WOULD BE: \$114,983.98

PRELIMINARY DRAFT

FAIR LABOR STANDARDS ACT
DOLLAR IMPACT ON SALT LAKE CITY CORP.

DEPARTMENT	PROGRAM AFFECTED	DOLLAR COST	BENEFIT \$	BENEFIT COST	TOTAL COST	% OF FTE EMPLOYEES	PERCENTAGE OF TOTAL EMPLOYEES	MIL LEVY INCREASE C.F. ONLY
POLICE	COUNTY TIME	\$6,000	-	-	\$6,000			
	PARITING WATER COLLECTION	31,946	7.05	\$2,393	34,339			
	CONSTANT TRAINING	11,808	21.08	7,565	43,453			
	SCHOOL CROSSING CHAIRS	39,400	7.05	2,760	43,160			
	TOTAL POLICE	116,984		12,718	129,702	4.74		0.1155
FIRE	56 HRS TO 53 HRS WORK WEEK	694,512	19.60	136,124	830,636			
	DISPATCH	4,631	16.70	773	5,404			
	CONSTANT TRAINING	222,351	19.60	43,581	265,932			
	OTHER COMP. TIME	40,468	19.60	8,010	48,478			
	TOTAL FIRE	962,362		188,488	1,150,850	42.73		1.0408
ADMIN. SERVICES	FLIGHT MANAGEMENT	10,211	16.70	1,705	11,916			
	OTHER COMP. TIME	30,683	16.70	5,124	35,807			
	TOTAL ADMIN. SERVICES	40,894		6,829	47,723	1.77		0.0432
DEVELOPMENT SERVICES	OTHER COMP. TIME	43,309	16.70	7,233	50,542	1.88		0.0457
PAGES	OTHER COMP. TIME	2,524	16.70	423	2,947			
	GOLF COURSES	95,513	16.70	16,448	111,961			
	TOTAL PARK	98,037		16,871	114,908	3.86		0.0027
AIRPORT	SECURITY	204,200	7.05	14,537	218,737			
	EMERGENCY	24,008	16.70	4,008	28,016			
	OTHER COMP. TIME	10,500	16.70	1,734	12,234			
	TOTAL AIRPORT	248,708		20,279	268,987	8.28		
PUBLIC UTILITIES	SEWER	92,831	16.70	15,506	108,337			
	WATER	2,700	16.70	451	3,151			
	TOTAL PUBLIC UTILITIES	95,531		15,957	111,488	4.14		
PUBLIC WORKS	OTHER COMP. TIME	116,984	16.70	19,202	136,186	4.98		0.1214
	TOTAL	81,201,819 (1)		\$25,777	\$1,987,428	73.79 (2)		1.3891 (4)

PREPARED BY:

(1) INCURRED FROM 1994 CALIFORNIA YEAR

(2) AVERAGE EMPLOYEE SALARY PLUS THREE = \$24,011

(3) BASED ON TOTAL EMPLOYEES OF 2040

(4) MIL LEVY IS ON GENERAL FUND ONLY

PRELIMINARY

 DRAFT

FAIR LABOR STANDARDS ACT
 Impact on Salt Lake City Corporation

	1984-85 General Fund & Enterprise Fund Budgets	Increase	% Increase
POLICE	\$ 19,393,346	\$ 132,811	.68
FIRE	14,725,614	1,196,882	8.13
ADMIN. SERVICES	3,182,967	49,632	1.56
DEVELOPMENT SERVICES	1,994,159	52,563	2.64
PARKS	7,934,212	108,075	1.36
AIRPORT	41,676,800	271,439	.65
PUBLIC UTILITIES	38,063,819	115,968	.30
PUBLIC WORKS	14,468,193	139,554	.96
 TOTAL Depts.	 \$141,439,110	 \$2,066,924	 1.46%
 TOTAL CITY	 \$152,624,496	 \$2,066,924	 1.35%

(EDITOR'S NOTE: In the interest of economy, certain additional attachments accompanying this statement were retained in the files of the committee.)

Senator NICKLES. Thank you very much.

Mr. Allen.

Mr. ALLEN. It is toward the end of the hearing, and I do not have to repeat everything that has already been said.

I believe there has been testimony brought up today that there is a difference in the public and private sector and the practical relationships of those sectors with their employees are different. The needs are different; the purpose is different.

I believe the testimony of the police officials, the parks recreation, those governmental agencies whose work cycles are different and beyond control in many instances, certainly more beyond control than another private sector, point up those differences. We have 24-hour responsibilities with Public Health Safety, and it is impossible to accommodate those needs in the same manner the private sector has available.

We have had mentioned by Mr. Stone about the potential impact of Fair Labor Standards Act overtime provisions with respect to Oklahoma City and the firefighters in Oklahoma City. The Senator well knows we operate under very tight fiscal constraints. We do not have the option to engage in deficit financing nor in operating deficits. So when you try to assess the impact of the overtime requirements when the present scheduling of our public employees, yes, you must look at the worst case scenario.

Under this decision we lose the ability to control scheduling, and with our budgetary requirements, indeed, we have to be able to meet those requirements. The prepared statement does list some six specific areas in which *Garcia* affects the city of Oklahoma City.

We urge Congress to reassess the impact and also the need for the Fair Labor Standards Act provisions with respect to Federal, State, and city employees in Oklahoma City. Eighty-three percent of our employees are represented by collective-bargaining agents in Oklahoma City. The minimum, the lowest hourly rate, that we pay employees is \$5.77 per hour.

We certainly support the Senator's efforts to correct *Garcia* with respect to our cities and our employees.

Thank you.

[The prepared statement of Mr. Allen follows:]

CITY OF OKLAHOMA CITY
SCOTT JOHNSON, CITY MANAGER

TESTIMONY
OF
ROBERT D. ALLEN
OKLAHOMA CITY MUNICIPAL COUNSELOR

REPRESENTING
NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS
BEFORE
THE SENATE LABOR SUBCOMMITTEE OF
THE SENATE COMMITTEE ON LABOR AND HUMAN RESOURCES

CONCERNING
THE IMPACT OF THE SUPREME COURT'S
GARCIA DECISION
UPON THE CITY OF OKLAHOMA CITY

AUGUST 28, 1985

THE CITY OF OKLAHOMA CITY

Stretching across five counties and 620 square miles, Oklahoma City is one of the five largest cities measured by land area. With a current population of 430,000, the City of Oklahoma City is approximately the 31st largest city in the United States and is growing at an average rate of 2 percent per year. It is logical to assume that with this growth, the demands for services provided by the City will increase.

Although demand for services is increasing, available revenues are decreasing. Severe drops in oil field activity and the construction industry have caused a downturn in the local economy. Over half of the City's revenue base consists of a two percent local sales tax that has experienced little or no growth over the past several years.

Additionally, critical infrastructure and capital funding problems have necessitated a reallocation of operation funds to capital improvements. Depletion of bond funds, last voted by the public in 1974 and 1976, is compounded by the potential withdrawal of revenue sharing funds by the federal government next fiscal year. Oklahoma City's revenue sharing allocation of \$8 to \$10 million per year has been the City's primary source of capital improvement funding since 1976. Repeated attempts to pass bond issues and increase the sales tax percentage, by referendum as required by state law, have failed since 1978. Failure to generate new sources of revenue heightened by mounting capital needs has resulted in a budgetary reduction of approximately 350 full-time positions since 1982-83.

The Supreme Court decision on February 19, 1985 subjecting state and local jurisdictions to the Fair Labor Standards Act (FLSA) will only serve to further the economic plight of this City, as well as other municipalities across the nation. As anticipated, the greatest area of concern is the overall cost liability. If all current work schedules were continued by the City of Oklahoma City, the cost under FLSA would encompass an approximate \$2,600,000. This additional cost, representing overtime pay required by the FLSA, will become a reality if union negotiations concerning work schedules are not successful. This may very well be the case as evidenced by a recent temporary injunction precluding the City from revising fire fighter schedules

to meet manpower requirements while complying with the Act, and avoiding overtime costs which the City cannot afford.

Oklahoma City shares many of the same problems with metropolitan areas throughout the United States. The financial impact of the FLSA will be strongly felt by state and local governments across the nation. The FLSA does not take into account the public service needs of local governments or the work preferences of their employees. Many employees, particularly police and fire personnel, need time off for mental and physical rehabilitation and prefer work schedules which accommodate their needs. This report will encompass a detailed discussion of these and other facts that impact Oklahoma City's delivery of needed public services and the problems injected into such process under the FLSA.

We have highlighted six major areas of concern that are applicable to Oklahoma City, as well as other major localities:

- I. union contractual agreements providing compensation over and above FLSA requirements.
- II. work hours traditionally viewed as normal work hours, now deemed overtime hours, specifically in the case of fire fighters.
- III. monetary overtime payments formerly met through compensatory time off (comp. time).
- IV. mutual aid, dual purpose, and city ordinances requiring the use of certain City employees, e.g., police officers, code enforcement inspectors, fire fighters.
- V. provisions of the Act that do not make accommodations for the special problems of governmental entities that involve work of a recreational nature.
- VI. recordkeeping and computerized payroll systems that are at variance with the additional recordkeeping requirements under the Act.

I. COMPENSATION OVER AND ABOVE FLSA

The City of Oklahoma City has contractual agreements with three separate unions, each including a sizable portion of the City's budgeted positions: American Federation of State, County, and Municipal Employees (AFSOME) with 1,923 positions, Fraternal Order of Police (FOP) with 750 positions, and International Association of Fire Fighters (IAFF) with 691 positions.

Collectively these positions account for 83 percent of the City's total budgeted positions. For the most part, these same positions have been determined to be nonexempt under the Act.

Oklahoma City's collective bargaining agreements specify overtime as being either hours worked in excess of the regularly scheduled day or hours worked in excess of the workweek, which in the case of AFSOME and FOP employees, is a 40-hour workweek. Traditionally, most covered City employees have been compensated for hours worked in excess of the workday; this is above and beyond FLSA requirements. In addition, City policy and contractual agreements allow the inclusion of leave benefits, i.e., vacation, sick, holiday, etc. as hours worked when computing overtime. The FLSA excludes these paid lost time hours from overtime calculations and will require either excessive payments or dual recordkeeping systems.

In addition, Oklahoma City conducts annual salary surveys to ensure comparable and equitable compensation for all employees. The lowest full-time hourly rate paid by the City of Oklahoma City is \$5.77.

II. OVERTIME

Although the Act allows extended hours under Section 7(k) for Police and Fire, once again contractual agreements, entered into before the Garcia decision was issued, are hindering our efforts to comply and to minimize overtime costs. As mentioned earlier, the FOP contract mandates a 40-hour workweek for police, negating the possibility of implementing the 42.8-hour, 7-day workweek. However, our current situation with the IAFF can best depict the difficulties we are confronting in implementing the FLSA regulations.

In the Act, Congress empowered the Secretary of Labor to mandate the standard hours worked by police and fire personnel in a 28-day cycle. The standard hours established would be based on studies conducted of the average hours worked by public safety personnel employed by all public agencies. In 1974, as a result of this regulation, the Department of Labor established 240 hours as the maximum allowable work hours for fire fighters. Since that time, surveys have been conducted of hours worked by fire protection personnel, and the original standard of 240 was gradually reduced as follows: 1976 - 232 hours; 1977 - 216 hours; 1983 - 212 hours.

Due to the Usery decision in 1976, which exempted state and local governments from FLSA, we were never included in those follow-up studies. Therefore, our fire fighter schedules still reflect the original standard of 240 hours in a 28-day cycle as was promulgated when states and localities were first subject to the Act in 1974. Had state and local governments been subject to the Act over the last 10 years or had we been advised of the changing schedules, then the Garcia decision might not have created such a severe impact on municipalities as is currently the case. It should also be noted that in making such evaluations and appraisals, the Act further directs the Secretary of Labor to consider the ability of the employers to absorb wage increases (29 U.S.C. 201. Sec. 4(d)(1)).

In applying Section 7(k) to our fire fighter operations, a 27-day work cycle was identified as being the least disruptive to the workforce and presented the fewest number of administrative problems. As specified in current regulations, the standard hours in a 27-day cycle are 204; City of Oklahoma City fire fighters (approximately 691) work 216 hours in a 27-day cycle which was the original standard set in 1974. Due to economic constraints, we are unable to hire additional employees or pay overtime. An attempt was then made to implement a system that stipulated 12 leave hours be taken by each 24-hour shift employee within each 27-day cycle.

We were thwarted in our efforts to implement this system when an injunction was placed against the City preventing us from making any changes to the work schedule. Successful negotiations on this matter are unlikely at this point because our current economic situation restricts our bargaining power. This situation is indeed a grave concern as the cost, under the FLSA requirements,

for maintaining fire fighter schedules would be \$1,950,000 annually.

III. OVERTIME PAY-VS-COMP. TIME

The elimination of compensatory time off (comp. time) is further encumbering our cost liability. Compensatory time has long been an accepted practice in the public sector and is preferred by many employees as a means of increasing available time off for leisure activities or personal business. Employees involved in emergency and seasonal operations have typically enjoyed the use of extra time off during non-emergency or off-season periods. The cost effect will be most apparent in situations involving essential governmental work of an unpredictable nature, such as undercover police work, crime scene investigations, and emergency snow and ice removal.

Entertainment services provided by the City require extensive work hours even though events are scheduled in advance. The very nature of the work performed by the Public Events Department requires a flexible work schedule. When events are scheduled, employees may be required to work long hours to ensure adequate services are provided. When events are not scheduled, employees are allowed time off to compensate for overtime hours earned during events. With implementation of the FLSA, this practice is no longer allowed. The Public Events Department is still required to provide the same service without an increase in budget (or revenues) to cover overtime costs.

IV. MUTUAL AID/DUAL PURPOSE

It is a common practice for large municipalities such as the City of Oklahoma City to provide "free assistance" to other city, state, county, and federal agencies when their public safety employees are lacking the specialized training required to successfully handle these situations. These activities include specialized crime investigation, special weapons and tactical unit (SWAT)/hostage negotiation, fire suppression, riot control, etc. Because of the tremendous impact of the FLSA upon the City of Oklahoma City public safety functions, it is likely that this free aid practice will be discontinued. An option would be to charge the cost of this assistance to the other agencies for the services provided. This would increase the financial burden of other governmental agencies including the federal government.

On November 12, 1984, the Air Logistics Center at Tinker Air Force Base caught fire, creating the most costly inferno in the history of Oklahoma. The world's largest air logistics building, which is one mile long and a quarter mile wide, burned for several days. Thousands of dollars in manpower and equipment were poured into the fire fighting effort. The City of Oklahoma City Fire Department was asked by the federal government to assist in extinguishing the unruly blaze.

When finally contained, the fire had cost an astonishing \$63,292 for Oklahoma City's services. This does not include the approximate \$7,889 overtime cost or the loss of manpower and equipment hours to the City of Oklahoma City, but does include 1,408.5 straight-time man hours, 432 equipment hours, and equipment damage costs. The City provided this service to the federal government at no cost under the unspoken and unwritten "free mutual aid" agreement that exists between public safety forces across the United States. This example is just one of many where the City of Oklahoma City has provided "free aid" to other agencies.

"Free aid" is also provided on a daily basis to state and federal law enforcement agencies when local authorities enforce narcotic, sex crime, and homicide laws. These types of crimes are covered by state and federal laws, not local ordinances. The Oklahoma City Police Department is not bound by law or agreement to enforce these laws, but does so as a cooperative effort to curb crime. This expense is further compounded when City officers are required to testify in federal, state, and county court concerning their involvement in these cases. The City of Oklahoma City had the option to exchange salary and overtime pay due to officers involved in these functions with comp. time. These court appearances that often occur on personal time must now be compensated financially instead of with time off, and under the FOP contract, a minimum of two hours of compensation is guaranteed.

The City would also be required to financially compensate police officers when they serve a dual purpose to the City and a private employer, such as crowd control at concerts, escorting oversized loads on City streets, funeral escorts, honor guards, etc. These practices are "extra" services to citizens that have been provided through arrangements with the Oklahoma City Police Department. Because of the dual employment provisions of the FLSA, these practices will be too expensive to continue, although this type of work has been highly sought after by employees.

State and City laws require inspection of plumbing, heat and air, electrical, building construction, etc., that are not scheduled by the City of Oklahoma City but by various private contractors. The City must provide code enforcement inspectors to enforce these code requirements when the private contractors are working, which during good weather is 7 days a week, 10 to 12 hours per day. As you can see, City inspectors' work schedules are dependent upon hours worked by the contractor and in the past these overtime hours have been paid through comp. time that is taken during building construction slumps. These inspections are conducted to protect consumers from purchasing poorly built homes and buildings and to prevent death or injury due to electrical shock, fires, asphyxiation, etc.

V. RECREATIONAL WORK

Section 13(a)(3) exempts employees of recreational or amusement establishments that operate on a seasonal basis, e.g., golf courses, swimming pools, etc. from minimum wage and overtime provisions of the FLSA. However, the law is unclear as to the exempt status of a seasonal facility that is physically part of a larger establishment such as a park. The park, open year round, may not qualify for the seasonal exemption, but the pool would qualify since it operates only four months per year. The exempt status of several of our amusement establishments will be in question until the seasonal exemption as it relates to government entities is clarified.

VI. RECORDKEEPING

Compliance with the recordkeeping requirements pursuant to the Act is evolving into a bookkeeping nightmare. The City of Oklahoma City is currently implementing the recordkeeping guidelines imposed by the FLSA. The total cost of complying with these requirements has yet to be determined; therefore, is not reflected in the aforementioned \$2.6 million figure.

The cost, which is expected to be immense, will include such items as: (1) recalculation of regular rate to include longevity pay, anticipated bonuses, and various incentive payments; (2) manual calculation of overtime pay (our computerized payroll system will require updating to accommodate calculation of overtime as per the FLSA); (3) calculating compensation due under defined workweeks that overlap with the payroll period; and (4) strict and time consuming recording of hours worked that were previously not documented, such as in the Police Department.

CONCLUSION

This report has only highlighted the major problems plaguing this City since the Supreme Court's decision in February. Throughout the City, there are a multitude of individual cases that will also be impacted. In addition, the Department of Labor's announcement of April 15, 1985 as the effective date for application of the FLSA to state and local governments did not allow the time necessary for full compliance.

Every effort is being made to comply with all FLSA regulations, but as clearly shown in this report, other alternatives are necessary. Services provided to citizens in the nature of police and fire protection and public works such as sanitation, water/sewer, streets, and traffic operations are crucial to our citizens. Furthermore, Oklahoma City has been forced to reduce the workforce by seven percent over the past three years. Additional financial burdens placed on the City by the FLSA will most certainly require further reductions in vital public services.

RECOMMENDATIONS

Congress should enact legislation expressly exempting state and local governments from the FLSA. If this is unacceptable, then Congress should authorize and direct the Secretary of Labor to promulgate regulations which effectively allow the public needs of these jurisdictions to be met without unnecessary expenditures for overtime work by public health and safety personnel.

I. Exempt State and Local Governments From FLSA

All City employees are currently paid at least minimum wage. In fact, the contractual agreements covering 83 percent of Oklahoma City employees provide salary and benefit packages that far exceed those provided to private sector employees. Under the FLSA, unnecessary additional payments will become excessively burdensome.

Although now superceded by the FLSA, all three union contracts provided overtime compensation at time and one-half in the form of money or time off. Employees generally prefer the comp. time. The loss of this extra time off is felt by many City employees, particularly in those cases where the work is of such an intense nature that the time off is more desirable and necessary.

Finally, in view of the recent injunction regarding the fire fighter schedules and the City's continuing financial constraints, the overtime amounts cannot be met without reducing the services provided to the citizens. This would then generate lay-offs or mandatory furloughs during periods of light activity. The intent of the FLSA was to protect employees; the result of Garcia is the reverse.

As justified here and throughout this report, Congress should exempt municipalities from the Fair Labor Standards Act.

II. Gradual Phase-In Time for Compliance and Amendments to the Act

Should Recommendation I not be acceptable, Congress should adapt Recommendation II to include the following three subparts:

A. Gradual Phase-In Time

In 1974 when state and local governments were first subject to the FLSA, a phase-in period was enacted to allow time for compliance, specifically in areas of police and fire. In addition, the standard maximum work hours for police and fire personnel have been gradually reduced over the last 10 years. Because of their exemption, state and local jurisdictions were never subject to these standards. Now that we are once again subject to the FLSA, we are expected to immediately reduce the maximum hours (as we attempted to do through union negotiations but have been unsuccessful) or be liable for the overtime payments. Successful negotiations (if possible) may take time since only certain issues are negotiated each year.

Congress should recognize the special circumstances of municipalities by reenacting for state and local jurisdictions the original standard hours established for all public safety employees in 1974. This should include an amendment to allow comp. time for payment of the difference between the original and current allowable hours. Once the original standards are reinstated, municipalities can gradually phase-in the new standards. This gradual phasing-in process both necessary and appropriate since that was the intent of Congress in the first place.

B. Allow Comp. Time to Remain Intact as a Method of Overtime Payment

As mentioned earlier, comp. time has long been an acceptable practice between both the employer and the employee alike. Rather than prohibit its use entirely, Congress should recognize that since it benefits both employer and employee, it should be restored within certain guidelines. These guidelines should include a 12-month period to use all accumulated comp. time, and at the end of such period, any remaining balance would be compensated financially.

C. Amend Provisions of the Act to Accommodate the Special Circumstances of State and Local Governments

There are certain provisions of the Act that are unclear in their applicability to governmental jurisdictions. We are aware that several provisions have already been put forth for revision by other governmental entities. One that concerns the City is the provision that exempts employees in recreational or amusement areas. We are responsible for many area parks characterized by pools, tennis centers, golf courses, etc. As is our understanding of the law, these facilities may not be regarded as separate entities; therefore, as part of a park, these facilities may not qualify for the seasonal exemption. This provision should be revised so that governmental jurisdictions may use this exemption.

CONCLUDING STATEMENT

The City of Oklahoma City and the National Institute of Municipal Law Officers appreciate the opportunity to address this Subcommittee on the impact of Garcia on municipalities and are willing to provide any additional information as requested.

Senator NICKLES. To our final panel I appreciate your comments and also your support of the legislation. To all of our people, I want to thank you for your attendance today.

Also for the record, I have several additional statements that we will enter into the record on the behalf of the Oklahoma State Chamber of Commerce and Associated Industries of Oklahoma, the Association of Central Oklahoma Governments, the Oklahoma Farm Bureau, the Oklahoma Wildlife Federation, the Oklahoma Municipal League, and also a transcript from the hearing that was conducted in Tulsa County on August 22.

I also have for the record a letter from the city of McAlester, and a resolution from seven county commissioners associations. We will keep the record open for an additional 2 or 3 weeks for comments. There are other people who did not testify that may wish to have a statement included in the record, and we will be happy to include that as well.

[Information supplied for the record follows:]



OKLAHOMA MUNICIPAL LEAGUE

201 N.E. 23rd STREET - OKLAHOMA CITY, OKLAHOMA 73105 - AC/406 528-7515

August 23, 1985

RESULTS OF A SURVEY CONDUCTED AMONG CITIES AND TOWNS IN OKLAHOMA AS TO THE IMPACT OF THE APPLICATION OF THE FEDERAL FAIR LABOR STANDARDS ACT ON MUNICIPAL GOVERNMENT OPERATIONS.

During July and August of 1985, officials from 128 cities and towns responded to a survey conducted by the Oklahoma Municipal League as to the impact of the federal Fair Labor Standards Act (FLSA) on their municipal operations and finances.

The total extra cost for one year attributed to compliance with the FLSA for these 128 municipalities amounted to \$5,733,977. These costs do not necessarily reflect the reduction or elimination of services that occurred because of the imposition of the FLSA nor the reduction in maintenance of the municipal infrastructure nor elimination or reduction in capital improvement.

In order to come into compliance with the FLSA, these cities and towns for their "general" operations excluding police and fire departments, took the following actions:

- 19 municipalities reduced the number of their personnel;
- 29 reduced the number of hours their general employees worked;
- 19 added personnel to reduce the cost of paying overtime;
- 19 either reduced or eliminated fringe benefits for their employees;
- 10 reported eliminating certain services for the public;
- 22 reduced services to the public;
- 79 maintained their existing service level;
- 12 eliminated capital improvement projects; and
- 33 reduced the number of their planned capital improvement projects.

Certain financial actions were also considered to raise revenue to comply with the FLSA.

- 29 municipalities increased their utility rates,
- 7 proposed sales tax increases, and
- 15 proposed license fee increases.

Thirty-three cities and towns had to reduce their operating reserve fund in order to balance their budgets.

In regard to public safety operations, in the fire departments

- 9 municipalities reported cutting the shifts of their firefighters;
- 3 added personnel to reduce overtime payments;
- 3 closed fire stations;
- 3 reduced the pay of the firefighters; and
- 7 reduced the fringe benefits that were paid.

As to the fire service itself, ten eliminated certain fire services or reduced fire services.

In the police department,

- 15 municipalities cut the shifts of the police;
- 11 added more police personnel;
- 5 reduced the pay; and
- 10 reduced the fringe benefits.

Eight municipalities eliminated some police services and 15 reduced some police services.

Following are summaries of some of the comments made in the survey taken by the Oklahoma Municipal League:

ADA:	Were very near compliance prior to decision.
ALLEN:	Reduced hours for water/sewer system maintenance to allow time for any emergency situation that might arise.
ALVA:	Unable to give larger pay increases because more was required to offset possible overtime liability.
APACHE:	Will probably have to reduce benefits, services, and increase charges just to continue. Elimination of capital improvements -- causes decay and ultimate death of small towns. Are discontinuing assistance to county law enforcement except in dire emergencies.
BOISE CITY:	Eliminated all weekend requests for service unless emergency.
BROKEN ARROW:	Unable to create new positions that were needed in critical departments.
CANUTE:	Had to reduce salaries.
CARNEGIE:	All phases of employment that necessitated hours, have been reduced or eliminated. Some services cut. Asked if federal government could be persuaded to stay out of city business.
CASHION:	Unable to complete necessary repairs on gas and water systems because may require overtime they can't afford.
CHANDLER:	Additional money required for compliance in public safety area caused reduction in personnel, operations, and maintenance. Forced to reduce manpower in police department and now evaluate situation to determine whether or not to respond to non-emergency calls.
CLINTON:	Have reduced fire calls outside city limits.
CORDELL:	With uncertainty of general revenue sharing coupled with FLSA requirements, they have reduced capital improvements and aren't planning future capital improvements.
DEL CITY:	Close to compliance prior to decision.

DURANT: Basically in compliance prior to decision. Should overtime become significant, due to crisis situations, it would be a major problem since comp time is no longer allowable.

EDMOND: Not able to plan all capital improvements necessary due to additional funds budgeted for overtime.

ELMORE CITY: Eliminated ambulance services.

EL RENO: Are requiring police and fire personnel to take holidays and vacation during shifts that otherwise would have required overtime being paid, in order to keep overtime to a minimum. Have eliminated police escorts for funerals.

FAIRLAND: Have eliminated constant police surveillance to obtain adequate coverage during critical times. This was done so they could reduce hours to prevent overtime liability.

FORT GIBSON: Will finish current capital improvement projects but will be hampered for future improvements.

FREDERICK: Reduced hospital benefits for employees. Had to reduce reserves to complete capital projects.

GLENPOOL: Initiated pay freeze, reduced street repairs and are delaying capital improvements.

GUTHRIE: Anticipate future reductions in personnel. Have eliminated all overtime except public health and safety areas.

GUYMON: Will probably have no choice but to keep increasing utility rates to offset increased overtime costs caused by emergencies in gas and water divisions.

LEXINGTON: Had no choice but to eliminate capital improvements.

LUTHER: Water and sewer maintenance overtime eliminated since comp time no longer allowed.

McALESTER: Now require firefighters to take one holiday per each 27 day work period to reduce overtime liability.

MARLAND: Eliminated police -- now rely on county law enforcement only.

MOFFETT: Reduced full time police to part time.

MOUNDS: Unable to employ additional needed personnel. Reduced police patrols, eliminated brush hauling, and are not building a planned garage building.

OCHELATA: Eliminated police and now rely totally on county law officers.

OKEENE: Will probably have to reduce or eliminate future capital projects.

OKLAHOMA CITY: Will possibly have reductions in personnel in future. Are attempting to require what would be overtime to be taken in leave, by firefighters, each 27 day cycle, but have to overcome court injunction. Have reduced mowing and recreational services.

OWASSO: Reduced hours in fire service which result in fewer personnel, periodically, on operating shifts. Reducing capital improvements which will be further impacted if general revenue sharing is reduced or eliminated. Have restricted number of police officers and hours required for special events since comp time eliminated. Estimate response and repair time in public works division will increase due to fewer personnel "on-call".

PONCA CITY: No pay increases this year. Have reduced support for civic activities such as parades, Chamber of Commerce events,

Fourth of July activities, etc. Extended time between mowing and cleaning parks and other public areas. Probably will reduce street clearing of snow, and sanding, during winter season. Had to reduce anticipated capital improvements by more than 70% from previous years. Police limiting accident investigation to those with injury and or high property damage. Continuity of criminal investigations limited because of no overtime.

- SAYRE: Will have to reduce services if sales tax increase is defeated by voters. Eliminated one full time police officer which reduced coverage.
- TONKAWA: Complaints from employees because of elimination of comp time.
- TULSA: Were substantially in compliance prior to decision.
- UNION CITY: Reduced vacation time to provide funds for unavoidable overtime.
- WOODWARD: Reduced after hours turn on's and turn off's for water customers.
- YALE: Reduced maintenance to cut back hours worked.

The following tabulation reflects the individual municipal responses to the survey that was conducted by the Oklahoma Municipal League.

THE NUMERAL "1" INDICATES A "YES" ANSWER
THE NUMERAL "0" INDICATES A "NO" ANSWER

GENERAL

MUNICIPALITY	REDUCE PERS.	REDUCE HOURS	ADDED PERS.	REDUCE OR ELIN BENEFITS	REDUCE OR ELIN TRAVEL	ELIMIN- ATE SERVICE	REDUCE SERVICE	MAINTAIN CURRENT SERVICE	ELIMIN- ATE CAPITAL IMPROVE MENTS	REDUCE CAPITAL IMPROVE MENTS	DID YOU INCREASE			
											UTILITY RATES	SALES TAX	LICENSE FEES	REDUCE RESERVE
ADA	0	0	0	0	0	0		1	0	0	1		1	
ALLEN	0	1	0	1	1	0	0		0	0	0	0	0	
ALVA	0	0	0	0	1	0	0	1	0	0	1			1
ANES	0	0	0	0	0	0	0	1	1	0	0	0	0	1
ANABARKO	0	0	0	0	0	0	0	1	0	0	1	0	0	0
APACHE					1	0	0	1	1					
ARDMORE	1	1	1	0	0	1	1	0	1	1	0	0	1	
ARNETT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
BARKSOALL	0	0	0	0	0	0	0	1	0	0	0	0	0	0
BLACKWELL	1	1	0	0	0	0	0	0	0	1	0	0	0	0
BOISE CITY		1					1	1	0	0	0	0	0	1
BOKOSHE	0	0	0	0	0	0	0	0	0	0	0	0	0	0
BROKEN ARROW	0	0	0	0	1	0	0	1	0	0	0	0	0	1
BROKEN BOW	1	1	0	0	1	1	1		0	0				
CACHE	0	0	0	0	0	0			0	0	1	0	1	
CALERA	0	0	0	0	0	0	0	1	0	0	0	0	0	0
CALVIN	0	0	0	0	0	0	0	1	0	0	0	0	0	0
CANUTE	0	0	0	0	1	0	0	1	0	0	1	0	0	0
CARNEGIE	1	1	1	1	1	1	1	1	1	1		1	1	
CASHION	0	1		1	1	0	0	1	0	0				
CASHION	0	1	0	0	0	0	0	1	0	0	0	0	0	0
CHANDLER	0	1	0	0	1	1	1	0	0	1	1	0	0	0
CHATTANOOGA	0	0							0		1	0		
CHOCTAW	1	0	1	0	0	1	0	1	0	0	1	0	1	1
CHUTEAU			1			0	0	1	1	1	1	0	1	0
CLAREMORE	0	0	0	0	0	0	0		0	0	0	0	0	0
CLINTON	0	0	0	1	1	1			1	1				
CORDELL	1	0	0	0	1		1			1	0	1	0	
COYLE		1												
CUSHING	0	0	0	0	1	0	0	1	0	0	0	0	0	1
DEER CREEK	0	0	0	0	0	0	0	1	0	0	0	0	0	0
DEL CITY	0	1	0	0	0	0	1		0	0	0	0	0	0
DEWEY														
DIBBLE	0	0	0	0	0	0	0	1	0	0	0	0	0	0
DOVER	0	0	0	0	1	0	0	1	0	0	0	0	0	0
DURANT	0	0	0	0	0	0	0	1	0	0	0	0	0	0
EDMOND	0	0	1	0		0	0	1	0	1	0	0	0	0
ELBORDO	1	0	0	0	0	0	0	0	0	0	0	0	0	0
ELGIN	0	1	0	0	0	0	0	1	0	0	0	0	0	0
ELMORE CITY	0	0	0	0		1			1	1				
EL RENO	1	0	1	0	0	1	1	1	1	1	1	0	1	1
ENID	0	0	1	0	1	0	0	1	0	1	0	0	0	1

THE NUMERAL "1" INDICATES A "YES" ANSWER
THE NUMERAL "0" INDICATES A "NO" ANSWER

GENERAL

MUNICIPALITY	REDUCE PERS.	REDUCE HOURS	ADDED PERS.	REDUCE OR ELIM BENEFITS	REDUCE OR ELIM TRAVEL	ELIMIN- ATE SERVICE	REDUCE SERVICE	MAINTAIN CURRENT SERVICE	ELIMIN- ATE CAPITAL IMPROVE MENTS	REDUCE CAPITAL IMPROVE MENTS	DID YOU INCREASE			
											UTILITY RATES	SALES TAX	LICENSE FEES	REDUCE RESERVE
FAIRLAND	0					0	0							
FAIRPORT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FAIRVIEW	0	1	0	0	0	0	0	1	0	1	0	0	0	0
FARGO														
FORGAN	1	0	0	0	0	0	0	1	0	0	1	1	0	0
FT. GIBSON	0	1	0	0	0	0	0		0	0	1	0	0	0
FREDERICK	0	0	0	1	1		1	1		1	0	0	1	1
GLENPOOL	0	1	0	1	0		1			1				
GOLTRY	0	0	0	0	0	0	0	1	0	0	0	0	0	0
GORE	0	0	1	0	0		0	1	0	0	0	0	0	0
GRANITE	1	0	0	0	0	0	0	1	0	0	1	0	1	1
GRANDFIELD	0	1	0	0	1	0	0	1	0	0	1	0	0	0
GUTHRIE	0	1	0	1	1	0	1	1	0	1	1	0	1	1
GUTHRIE	0	0	0	0	0	0	0	1	0	1	1	0	1	1
HEALDTON	0	1	0	0	1	0	0	1	0	1	1	1	0	1
HEAVENER	0	0	0	0	0	0	0	1	0	0	0	0	0	0
HENRY	0	1	1	0	1	0	1	1	0	1	0	0	1	0
HILBERT	0	0	0	0	0	0	0	1	0	0	1	1	0	0
INDIANONA	0	0	0	0	0	0	0	1	0	0	0	0	0	0
INDLA	0	0	0	0	0	0	0		0	0	0	0	0	0
JAY	0	0	0	0	0	0	0	1	0	0	0	0	0	0
KANSAS	0	0	0	0	0	0	0		0	0	1	0	0	0
KAN CITY	0	0	0	0	0	0	0	1	0	0	0	1	0	1
KINGFISHER	0	0	1	0	1	0	0		0	0	0	0	0	0
LAHONT	0	0	0	0	0	0	0	1	0	0	0	0	0	0
LAVERNE	0	0	0	0	0	0	0	1	0	0	0	0	0	0
LEEDY	0	0	0	0	0	0	0	1	0	0	0	0	0	0
LEMAPAW														
LEXINGTON			1			0	0	1	1		0	0	0	0
LINDSAY	0	1	1	1	1	0	0	1	1		1			1
LOME GROVE	0	0	0	0	0	0	0							
LUTHER	0	0	0	0	0		1	0	0	0				
MALESTER	0	0	1	0	0	0	0	0	0	0	0	0	0	0
MARIETTA	0	1	1	0	0	0	0	1	0	0	0	0	0	1
MARLAND	0	1			0	1	0		1					
MARTHA	0	0	0	0	0	0	0	1	0	0	1	0	0	0
MEDICINE PARK	0	0	0	0	0	0	0	1						
MENCO	0	0	0	0	0	0	0	0						
MOFFETT	0	0	0	0	0	0	0	1			0	0	0	0
MOORE	0	0	0	0	1	0	0	1		0	0	0	0	1
MOORE				1	1		1			1	0	0	0	0
MOUNTAIN PARK		1					1			1				1
MONTGOMERY	0	1	0	0	0	0	0	1	0	0	0	0	0	0
MOORE	0	0	0	0	0	0	0	1	0	0	0	0	0	0
MORRIS	0	1	0	1	0	0	0	1	0	0	0	0	0	1

THE NUMERAL "1" INDICATES A "YES" ANSWER
THE NUMERAL "0" INDICATES A "NO" ANSWER

GENERAL

MUNICIPALITY	REDUCE PERS.	REDUCE HOURS	ADDED PERS.	REDUCE OR ELIM BENEFITS	REDUCE OR ELIM TRAVEL	ELIMIN- ATE SERVICE	REDUCE SERVICE	MAINTAIN CURRENT SERVICE	ELIMIN- ATE CAPITAL IMPROVE MENTS	REDUCE CAPITAL IMPROVE MENTS	DID YOU INCREASE			REDUCE RESERVE
											UTILITY RATES	SALES TAX	LICENSE FEES	
OCCELATA	1	0	0	0	0	0	0	1	0	0	1	0	0	0
OKMACHE	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OWEENE	0	0	0	1	0	0	0	0	0	0	0	0	0	1
OKLAHOMA CITY	1	1	0	0	1	1	0	0	0	0	1	0	1	0
OKMULGEE	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OPTIMA	0	0	0	0	0	0	0	0	0	0	0	0	0	0
OMASSO	0	1	0	1	1	0	0	1	0	1	0	0	1	0
PAULS VALLEY	0	0	0	0	0	0	0	1	1	1	0	0	0	0
POCULA	0	1	0	0	1	0	1	1	0	0	0	0	0	0
POND CREEK	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PONCA CITY	0	1	0	1	0	0	1	0	0	1	0	0	0	0
POTEAU	0	0	0	0	0	0	0	1	0	0	0	0	0	0
RATTAN	0	0	0	0	0	0	0	1	0	0	0	0	0	0
ROCK SPRINGS	0	1	0	0	0	0	0	1	0	0	0	0	0	0
SALLISAN	0	0	0	0	0	0	0	1	0	0	0	0	0	0
SAYRE	1	1	0	1	1	0	1	0	1	1	0	0	0	1
SEMINOLE	1	1	0	0	0	0	1	0	0	1	0	0	0	1
SHATON	0	0	1	0	0	0	0	1	0	0	1	0	1	1
SPIRO	0	0	0	0	0	0	0	1	0	1	0	0	0	1
STOKINGTON	0	0	0	0	0	0	0	1	0	1	0	0	0	1
SULPHUR	0	1	1	1	1	0	0	1	0	1	1	1	0	1
TAMLEQUAH	0	0	0	0	0	0	0	1	0	1	1	0	0	1
TOKKARA	0	0	0	1	0	0	0	1	0	0	0	0	0	0
TULSA	0	0	0	0	0	0	0	1	0	0	0	0	0	0
TUTTLE	0	0	1	0	0	0	0	1	0	0	0	0	0	0
TYRONE	0	0	0	0	1	0	0	1	0	0	0	0	0	0
UNION CITY	0	1	0	1	0	0	0	1	0	1	0	0	0	1
THE VILLAGE	0	0	0	0	0	0	0	1	0	0	0	0	0	0
VISTA	0	1	1	0	0	0	0	1	0	1	1	1	1	1
WAKITA	0	1	0	0	0	0	0	1	0	1	0	0	0	1
WALTERS	0	1	0	0	0	0	0	1	0	1	0	0	0	0
WARRNER	1	0	0	0	0	0	0	1	0	0	0	0	0	0
WARR ACRES	1	0	0	0	0	0	0	1	0	0	0	0	0	1
WATKINS	0	0	0	0	0	0	0	1	0	0	0	1	0	0
WEATHERFORD	0	0	0	0	0	0	0	1	0	0	1	0	0	0
WENOLA	1	1	0	1	0	0	1	1	0	1	1	0	0	1
WILSON	0	0	0	0	0	0	0	1	0	1	1	0	0	0
WOODWARD	0	1	0	0	1	0	1	1	0	1	1	0	0	1
YALE	1	1	0	1	1	1	1	1	0	1	1	0	0	1
YUKON	1	0	1	0	1	1	0	0	1	0	0	0	0	1
TOTALS FOR 120 MUNICIPALITIES	19	39	19	19	31	10	22	79	12	33	29	7	15	33

THE NUMERAL "1" INDICATES A "YES" ANSWER
THE NUMERAL "0" INDICATES A "NO" ANSWER

MUNICIPALITY	FIRE							POLICE						
	CUT SHIFTS	IF SHIFT CUT, DID YOU?		IF SHIFT NOT CUT, DID YOU?		ELIMIN- ATE FIRE SERVICE	REDUCE FIRE SERVICE	CUT SHIFT	IF SHIFT CUT, ADD PERS.?		IF SHIFT NOT CUT, DID YOU?		ELIMIN- ATE POLICE SERVICE	REDUCE POLICE SERVICE
		ADD PERS.	CLOSE STATION	REDUCE PAY	REDUCE BENEFIT				ADD PERS.?		REDUCE PAY	REDUCE BENEFIT		
FAIRLAND	0	0	0	0	0	0	0	1	0	0	0	0	1	1
FAIRMONT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
FAIRVIEW	VOL.					0		0	0	0	0	0	0	0
FARGO														
FORGAN	VOL.							0		0	0	0	0	0
FT. GIBSON	VOL.							1		0	0	0	0	0
FREDERICK	0	0	0		1			0	0	0	1			
GLENPOOL	0			0	0	0		0		0	0		0	
GOLTRY	0	0	0	0	0	0	0	0					0	0
GORE	0	0	0	0	0			0	0	0	0	0	0	0
GRANITE	VOL.					0	0	0	0	0	0	0	0	0
GRANDFIELD	VOL.			0	0	0	0	0	0	0	0	0	0	0
GUTHRIE	0	0	0	0	0	0	0	0	0	0	0	0	0	0
GUYMON	1	1				0	0	0	0				0	0
HEALDTON	0			0	0	0	0	1	0	1	0	0	0	0
HEAVENER	VOL.			0	0	0	0			0	0		0	0
HOMINY	1	0	0	0	0	0	0	1	0	0	0	0	0	0
HULBERT	0	0	0	0	0	0	0	0	0	0	0	0	0	0
INDIANONA	0	0	0	0	0	0	0	0	0	0	0	0		
INOLA						0	0		0	0	0	0	0	0
JAY	VOL.	0	0	0	0	0	0	0	0	0	0	0	0	0
KANSAS	0			0	0	0	0	0	0	0	0	0	0	0
KAN CITY	VOL.	0	0	0	0	0	0	0	0	0	0	0	0	0
KINGFISHER	0	0	0	0	0	0	0		1		0	0	0	0
LANONT	VOL.			0		0	0	0		0	0	0	0	0
LAVERNE	0	0	0	0	0	0	0	0	0	0	0	0	0	0
LEEDY	0			0	0	0	0	0		0	0	0	0	0
LENAPAH														
LEXINGTON				0	0	0	0		1	0	0	0	0	0
LINDSAY	0			0	1	1			1				1	
LOWE GROVE	VOL.	0	0	0	0	0	0	0	0	0	0	0	0	0
LUTHER	0			0	0	0	0	0	0	0	0	0	0	0
MCALISTER	0			0	0	0	0	0		0	0	0	0	0
MARIETTA	0			0	0	0	0	0	0	0	0	0	0	0
MARLAND	VOL.	0				1		0	0	0	1	1	1	1
MARTHA	0	0	0	0	0	0	0	0	0	0	0	0	0	0
MEDICINE PARK	VOL.					0	0	0	0	0	0	0	0	0
MINCO	0	0	0	0	0	0	0	0	0	0	0	0	0	0
NEFFETT	VOL.	0	0	0	0				1		0	0	0	1
MOORE	0			0		0	0			0	0	0	0	0
MOUDS	VOL.					0	0						0	0
MOUNTAIN PARK	VOL.							0						
NEWKIRK	0	0	0	0	0	0	0	0	0	0	0	0	0	0
NOBLE	0			0		0	0	0			0	0	0	0
NORMAN	0	0		0	1	0	0		0	0	0	0	0	0

THE NUMERAL "1" INDICATES A "YES" ANSWER
THE NUMERAL "0" INDICATES A "NO" ANSWER

FIRE

POLICE

MUNICIPALITY	IF SHIFT CUT, DID YOU?			IF SHIFT NOT CUT, DID YOU?		ELIMIN- ATE FIRE SERVICE	REDUCE FIRE SERVICE	IF SHIFT CUT, DID YOU?			ELIMIN- ATE POLICE SERVICE	REDUCE POLICE SERVICE	
	CUT SHIFTS	ADD PERS.	CLOSE STATION	REDUCE PAY	REDUCE BENEFIT			CUT SHIFT	ADD PERS.	REDUCE PAY			REDUCE BENEFIT
ACHELATA	VOL.			0	0	0	0	0	0	0	0	1	
OKMACHE	VOL.	0	0	0	0	0	0	0	0	0	0	0	
OKENE	VOL.	0	0	0	1	0	0	0	0	1	0	0	
OKLAHOMA CITY	0			0	0	0	0	0	0	0	0	0	
OKMULGEE	0	0	0	0	0	0	0	0	0	0	0	0	
OPTIMA								0	0	0	0	0	
OWASSO	1	0	0			0	0	0			0	1	
PAULS VALLEY	0			0	0	0	0	0	0	0	0	0	
POCOLA	0			0	0	0	0	1	1	0	0	0	
POND CREEK	0	0	0	0	0	0	0	0	0	0	0	0	
PONCA CITY	1		1			0		0	0	0	0	0	
POTEAU	0			0	0	0	0	0		1		1	
RATTAN	0	0	0	0	0	0	0	0	0	0	0	0	
RUSH SPRINGS	0			0	0	0	0	0	0	0	0	0	
SALLISAW	0			0	0	0	0	0	0	0	0	0	
SAYRE	VOL.	0	0	0	0	0	0	0	0	0	0	0	
SETHOLE	0	0	0	0	0	0	0	1	0	0	1	1	
SKIATOOK	VOL.					0	0	0	0	0	0	0	
SPIRO	VOL.					0	0	0	0	0	0	0	
STRINGTOWN						0	0	0	0	0	0	0	
SULPHUR	1	0	1	0	0	0	1	1	0	0	0	1	
TAHLEQUAH	0			0	0	0	0	0	0	0	0	0	
TEHAWA	1	1	0			0	0	0	0	0	0	0	
TULSA	0			0	0	0	0	0	0	0	0	0	
TUTTLE	0			0	0	0	0	0	0	0	0	0	
TYBONE	0	0	0	0	0	0	0	1	0	1	0	1	
UNION CITY	VOL.					0	0	0	0	0	0	0	
THE VILLAGE	0			0	0	0	0	0	0	0	0	0	
VINITA		1				0			0		0	0	
WAKITA	VOL.			0	0	0	0	0		0			
WALTERS	0			0	0	0	0	0	0	0	0	0	
WARNER	0			0	0	0	0	0	0	0	0	0	
WARR ACRES	1	0	0			0	1	1	0	0	0	0	
WATONGA	0			0	0	0	0	0	0	0	0	0	
WEATHERFORD	0			0	0	0	0	0	0	0	0	0	
WENOKA	0	0		0	0	0	0	0	0	0	0	0	
WILSON	0			0	0	0	0	0	0	0	0	0	
WOODWARD	0			0	0	0	1	0	0	0	0	1	
TALE	VOL.												
YUKON	0						1	0				1	
TOTALS FOR 128 MUNICIPALITIES	9	3	3	3	7	4	8	15	11	5	10	6	15

MUNICIPALITY	AMOUNT INCREASED PERSONNEL COSTS DUE TO FLSA	PERCENT OF FY '86 BUDGET AS PERSONNEL COSTS	PERCENT OF FY '85 BUDGET AS PERSONNEL COSTS
ADA	40,000	54	59
ALLER		40	40
ALVA	20,000	54	53
AMES		10	10
AMADOR		29	26
APACHE	15,000	65	60
ARMORE	250,000	75	75
ARNETT	1,000	39	35
BARNSDALL	28,000	36	32
BLACKWELL			
BOISE CITY		27	22
BOKOSHE			
BROKEN ARROW	75,000	77	
BROKEN BOW	50,000	60	55
CACHE			
CALERA	1,500	14	15
CALVIN		60	60
CANUTE			
CARNEGIE	25,000	35	25
CASHION			
CASHION		23	22
CHANDLER	17,500	45	49
CHATTANOOGA			
CHOCTAW	25,000	61	58
CHOUTEAU	20,000	60	54
CLAREMORE			
CLINTON	25,000	59	56
CORBELL			
COYLE			
CUSHING	50,000	30	28
DEER CREEK		20	18
DEL CITY	25,230	47	49
DEWEY	12,000	48	32
DIBBLE		80	75
DOVER		57	57
DURANT	20,000	75	76
EDMOND	200,000	67	57
ELDORADO			
ELGIN	19,000	35	35
ELMORE CITY		50	
EL RENO	65,000	72	70
ENID	50,000	40	42

MUNICIPALITY	AMOUNT INCREASED PERSONNEL COSTS DUE TO FLSA	PERCENT OF FY '86 BUDGET AS PERSONNEL COSTS	PERCENT OF FY '85 BUDGET AS PERSONNEL COSTS
FAIRLAND			
FAIRMONT			
FAIRVIEW		30	28
FARGO			
FORGAN		47	49
FT. GIBSON	16,600	51	50
FREDERICK	8,000	68	70
GLENPOOL	25,000	60	60
GOKTRY		33	33
GORE		41	44
GRANITE		56	42
GRANDFIELD	2,000	33	32
GUTHRIE	75,000	74	56
GUYMON		52	61
HEALDTON	30,000	38	55
HEAVENLY			
HIGHTY	50,000	70	65
HILBERT	7,600		
INDIANHOMA		4	4
INDOLA		55	57
JAY		38	
KANSAS		23	19
KAN CITY	1,000	35	36
KINGFISHER	28,000		
LANOIT		30	25
LAYERNE		72	74
LEEDY		47	45
LENAPAH			
LEXINGTON	25,000	60	50
LINDSAY	48,000	67	61
LOME GROVE		51	50
LUTHER		39	39
McALESTER	48,000	60	55
MARIETTA	38,000	48	30
MARLAND		4	6
MARTHA			
MEDICINE PARK		10	10
RINCO			
MOFFETT	300	40	30
MOORE		48	52
MOONDS		65	65
MOUNTAIN PARK		65	75
NEWARK		24	27
NOBLE	13,944	52	47
NORIAN	258,000	52	48

MUNICIPALITY	AMOUNT INCREASED PERSONNEL COSTS DUE TO FLSA	PERCENT OF FY '86 BUDGET AS PERSONNEL COSTS	PERCENT OF FY '85 BUDGET AS PERSONNEL COSTS
ACHELATA		20	20
OKMARCH		30	30
OKNEENE	7,000	24	20
OKLAHOMA CITY	2,600,000	52	55
OKMUGEE	30,000	50	50
OPTIMA			
OKWASSO		57	56
PAULS VALLEY	0,674	57	55
POCOLOA	8,000	44	42
POMO CREEK			
PONCA CITY	90,000	79	76
POTEAU		21	24
RATTAR		30	30
RUSH SPRINGS		44	44
SALLISAW		25	24
SAYRE		49	40
SENTINOLE	30,000	54	61
SKIATOOK	40,000	81	80
SPIRO	10,000	24	22
STRINGTOWN			
SULPHUR	45,000	55	50
TANLEQUAH		30	49
TOMKANA	20,000	60	65
TULSA	500,000	70	70
TUTTLE	30,000	59	61
TYBONE		42	42
UNION CITY		50	47
THE VILLAGE	30,000	57	44
VINITA	200,000	65	
WAKITA	4,200	20	
WALTERS	20,000	76	
WARTER			50
WARR ACRES	39,542	45	43
WATONGA	53,000	51	49
WEATHERFORD	50,000		
WEMOKA	100,000	65	55
WILSON			
WOODWARD	35,000	60	55
YALE	7,007	49	43
YUKON	100,000	50	52
TOTALS FOR 120 MUNICIPALITIES	5,733,977		

City of

Lindsay

Oklahoma 73052

Post Office Box 708
Dist 405/756-2019

AUGUST 28, 1985

THE HONORABLE DON NICKLES
215 DEAN A MCREE
OKLAHOMA CITY, OK.
73105

IN RE: SENATE LABOR SUBCOMMITTEE MEETING AUGUST 28, 1985, ON GARCIA
VS. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, AS IT APPLIES TO THE
FAIR LABOR STANDARDS ACT.

Dear Honorable Senator Nickles:

The City of Lindsay Oklahoma respectfully request that this letter
be made a permanent part of the above mentioned hearing.

Since February 19, 1985, the effective date of the Supreme Court
ruling in Garcia vs. San Antonio Metropolitan Transit Authority, Our
community has been trying to decipher the mass of Department of Labor
regulations that have ensued. The problem is enormous. The Department
of Labor is having trouble with their interpretations also. The deep
underlying problems and ramifications of this ruling will not be felt
for months to come; however, a conservative estimate is that this ruling
alone will cost the City of Lindsay approximately \$150,000.00, during
budget year 85/86, in excess funds. Our Community has decided to
"weather the storm" and pay for all additional time, without curtailing
services. We do not have the funds to continue in this manner next
budget year.

I personally attended the Subcommittee hearing in Oklahoma City,
on August 28, 1985. I would like to quickly reiterate some of the prob-
lems and complications that this ruling will cause in our community, also.
I realize the committee has been informed on most of these; however, they
definitely deserve mentioning to reinforce the need for Senator
Nickles legislation (SB 1570).

The majority of the excess funds needed will be spent paying over-
time in our Police Department. Several have mentioned the crucial need
for extra hours during Natural disasters, manhunts, stakeouts, drug investi-
gations, theft investigation is crucial to the success of the case. How
can you count hours during times like these? But on the other hand, how
can a small community pay time and a half for a three day stakeout?

One of the items not touched upon at the hearing, is the negotiated relationship that was preconceived between the City employer and the employee officer. This relationship has been changed thru no fault of either party. Both parties had, at the time of employment agreed upon conditions of employment. Many had extra employment outside the City because of this arrangement. Now hours must be changed, schedules altered, and conditions changed in an effort to comply with "Garcia". Neither party wanted this. Many wanted the "comp time" in order to pursue a professional law enforcement career and a private sector job also.

In addition, DOL has been very specific on classification of "white collar employees". I don't believe they ever had to work in a small town OK. There is no way to classify employees according to their guidelines. On certain days, all employees, "white collar" or not might be in a ditch.

Whether we are ready to admit it or not, there is and always will be a difference between the Public employee and the Private Sector employee. I feel the Supreme Court refuses to acknowledge this. I know the FOP did at the hearing. We in local government are required to perform on an as needed basis, for generally lower wages than our private sector counterparts. It takes a unique person to be a public employee. He must be dedicated, persevering, and thick shelled. This in turn involves a give and take relationship between the employer and employee. The give is the work accomplishment and the take is the compensation and benefits. Most small governments cannot compensate for all work delivered. The tax payers won't stand for it. Yet they demand services. The only alternative is "Comp Time". We have been deprived of this method.

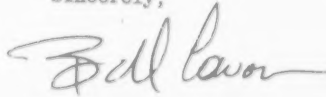
The Fair Labor Standards Act also deprives an employee from a dual working relationship with one employer. The case of the Talequah bus driver is only one example. The City of Lindsay had three of its own employees who were deprived of a second job because of this ruling. One was a fireman who read electric meters on days off. Both parties were happy with the arrangement, and the tax payers were saved money thru this arrangement. Now no job was created and one was lost.

As a final statement and overview, The City of Lindsay fully supports Senator Nickles effort to amend the Fair Labor Standards Act thru S1570. This is definitely a step in the direction of better morale, more flexibility, and more equitable working relationship for communities across the nation. We encourage and strongly ask that all Senators and Representatives come to the aid of this legislation, and see that it is passed as quickly as possible. Our employees ask that you allow the flexibility for them to serve in a professional manner, and

still be able to pursue other objectives.

Thank you again for allowing this letter to become a part of the record. And Thank you very much for your quick response to our needs thru S 1570. Please feel free to contact me if I might assist in any way.

Sincerely,



Bill Cowan
City Manager

BC/ln

cc: Senator David Boren
Representative James Jones
Representative Mike Synar
Representative Wes Watkins
Representative Dave McCurdy
Representative Glen English

AUG 22 1985



CITY OF McALESTER

P.O. BOX 878 • 1ST & WASH. AVE. • McALESTER, OKLAHOMA 74302 • PHONE 818 433-4300

August 20, 1985

AUG 27 1985

The Honorable Don Nickles
3003 Federal Building
333 W. 4th Street
Tulsa, OK 74103

Dear Senator Nickles:

The City of McAlester will be unable to send representatives to your congressional hearing regarding the Fair Labor Standards Act. However, we wish the statements and facts contained in this letter to become a formal response at this hearing.

Since the Garcia decision, the City of McAlester has had to restructure our administration policies regarding overtime, duty time, shift personnel, administrative leave, etc. Approximately 3,000 man hours have been involved and an additional expense of \$210,000.000 budgeted.

By budgeting \$210,000.00 for overtime and shift rotation we had to neglect several street and drainage problems because of a shortfall of funds.

The ironic thing about this is that our employees voted 183 to 17 in favor of keeping compensatory time in lieu of time and a half. They could not understand that the law didn't allow this option.

The ruling carried to the fullest extent is also an infringement upon employees rights to do secondary employment. An example of this is an employee who is a police officer during the day and works part-time in the recreation department, is working time and a half. Needless to say, it has been ceased.

This ruling also had an impact on collective bargaining agreements that were in effect. In essence, the unions who are supposed to represent employees desires were also hamstrung.

I appeal to the federal government for relief, immediate relief from this ruling and the immense ramifications that accompanied it.

Thank you,

Randy Green
Randy Green
City Manager

RG/dbs

MAYOR
W. B. "BILL" RAYBURN

COUNCIL
GLADYS MURPHY
BOB GREEN
DALE COVINGTON

JAMES BROWN
ROY BOATNER
HUGH GERMAN

CITY MANAGER
RANDY GREEN

**Association of
Central
Oklahoma
Governments**

4801 Classen Boulevard, Suite 200
Oklahoma City, Oklahoma 73118
(405) 846-8961



August 28, 1985

The Honorable Don Nickles
United States Senate
Washington, D.C. 20510

Dear Senator Nickles:

Thank you for your efforts to relieve state and local governments from the maximum hours provision of the Fair Labor Standards Act.

The local governments of the Association of Central Oklahoma Governments, like other local governments nationwide, have experienced financial strain as well as severe difficulty in meeting service demands as a result of the Garcia v. San Antonio Metropolitan Transit Authority decision. The financial impact is particularly painful at a time when significant reductions in financial resources are being experienced by most local governments, most certainly those in Oklahoma.

According to news accounts, the ruling will cost the State of Oklahoma an additional \$6 million, the City of Oklahoma City \$1.5 million and Oklahoma County approximately \$250,000 this fiscal year. Loss of the ability to utilize compensatory time off appears to have had the most negative impact.

We appreciate the fact that you recognize that local governments are trying to provide the best services possible with very limited public funds. Your concern and efforts are very much appreciated.

Sincerely,


Carl Reheman, Chairman
ACOG Board of Directors

CR/cw

Chairman Carl Reheman
Mayor, Edmond

Vice-Chairman Jim Simpson
Vice-Mayor, Moore

Secretary-Treasurer Peter G. Pence, II
Vice-Mayor, Nichols Hills

Executive Director
Zach D. Taylor

OKLAHOMA FARM BUREAU

August 28, 1985

P.O. BOX 53332 CAPITOL STATION • 2901 N. STILES
OKLAHOMA CITY, OKLAHOMA 73152 (405) 523-2300MEMORANDUM

TO: Senator Don Nickles

FROM: Frank Moore, Director, Governmental Relations

SUBJECT: Payment for Overtime

Oklahoma Farm Bureau commends Senator Nickles for his plans to introduce legislation that would override the Supreme Court decision banning the use of comp time in lieu of wages for overtime worked by state and local government employees. We would urge all members of our congressional delegation to join Senator Nickles in supporting this legislation.

Imposition of this type liability upon state, local and county governments is inappropriate since they were complying with the law of the land one day and the Supreme Court changed it overnight.

Most state and local governments are strapped for funds and need the flexibility of comp time and volunteer status to provide basic services to the public.

Oklahoma officials have estimated the court's ruling will cost state government at least \$6 million. The cost to county and city governments could easily equal or exceed that figure.

The ruling could devastate the sheriff's office and it will be almost impossible for the assessor to operate during the busy season without the opportunity to provide employees with comp time for hours worked beyond the normal work week.

What will county commissioners do when they have a disaster that affects rural roads, such as a flood or snow storm? What will they do if a tornado devastates an area, clogging roads with debris that must be cleaned up before emergency crews can make their way to the scene?

The Supreme Court's ruling will require those crews to quit at the end of the 40-hour week, no matter how much needs to be done to meet the emergency, or pay the workers overtime. And those overtime dollars are not available in those county and city budgets.

Our farmer members would find it difficult to understand the Supreme Court's logic. They wouldn't quit plowing in a field or harvesting a crop simply because the clock showed they had put in more than 40 hours that week.

Comp time has been a very popular option with Oklahoma workers. Many are upset because they are now losing their accumulated comp time, thanks to the Supreme Court's outlawing an option that an earlier panel had said was allowable. Many workers, in fact, prefer comp time over overtime pay.

The court's ruling also requires employee status for many persons who now serve as volunteers. It means many volunteers can no longer offer their volunteer services to state, county and municipal governments.

A volunteer who receives a small fee to cover incidentalexpenditures now could be classified as an employee covered by the Fair Labor Standards Act and because of a lack of funds at all levels of government, these volunteer service positions could be eliminated.

Many volunteer fire departments could either be shut down or scaled back due to the court ruling. Police and other basic services likewise could suffer the same fate.

We at Oklahoma Farm Bureau are convinced that federal intrusion into the employer-employee relationship at the state, local and county level is not warranted.

Oklahoma Farm Bureau is in total support of Senator Nickles' proposed legislation and again urges other members of our congressional delegation to offer their support.

FM:np

Oklahoma Wildlife Federation

State Affiliate National Wildlife Federation

4545 LINCOLN BLVD., SUITE 171 OKLAHOMA CITY, OKLA. 73105 (405) 524-7000

AUGUST 28, 1985

COMMENTS ON SENATE BILL 1570

Senator Nickles and committee members:

I thank you for the opportunity to comment on Senate Bill 1570.

I am David Strouse, Special Projects Director for the Oklahoma Wildlife Federation.

On behalf of our organization's president Mr. Odie Haley, I would like to state that the Oklahoma Wildlife Federation supports the amendments to the Fair Labor Standards Act of 1938 offered in Senate Bill 1570.

The difficulty of enforcing wildlife protection laws is well known.

Most of our 77 counties have but only one wildlife department ranger.

To adequately protect an area this size is difficult to say the least.

It can not be done on "banker's" hours limited to 40 hours per week.

I believe wildlife enforcement personnel were fully aware, when hired, that they would be expected to work "as needed".

Rangers I have talked with feel a sense of "frustration" when being forced to comply with the 40 hour work week restrictions imposed by the "Garcia Decision".

I further feel that this frustration has affected the overall morale of the enforcement division if not the entire department.

As we pointed out to you, Senator Nickles, in our August 8th letter, Operations besides enforcement will also be impacted.

The operations of many wildlife management programs can not be run nine to five. Sportsmen of this state can not be adequately served under the constraints imposed by the "Garcia Decision".

We applaud your efforts to rectify this situation with legislation and would like to go on record as supporting Senate Bill 1570

Thank you.

Statement Of The
Oklahoma State Chamber of Commerce
And
Associated Industries of Oklahoma, Inc.
Hearing on Fair Labor Standards Act
August 28, 1985

As a result of the Supreme Court's recent reversal of its 1976 decision in National League of Cities v. Usery, virtually all employees of state and local government jurisdictions will now be covered by the provisions of the Fair Labor Standards Act (FLSA).

The Oklahoma State Chamber of Commerce believes this to be an unconscionable intrusion of federal authority into the affairs of these jurisdictions which ignores the broad issue of the public good. Further, the costs of compliance will exacerbate the mounting financial problems now facing state and local governments.

The decision affects some 7 million local and state employees and who knows how many millions of volunteers by applying the overtime provisions, minimum wage, recordkeeping and other requirements of the FLSA to states and municipalities.

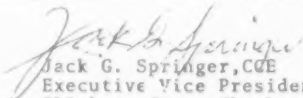
This new doctrine of federal supremacy to regulate state and local governments no doubt hits hardest at the public safety functions of those jurisdictions; ie: police and fire services.

Nationwide, it has been estimated that the costs to comply with the new ruling will total more than \$1 billion. In Oklahoma, a survey which drew responses from 128 cities and towns projected that the total extra cost of compliance for those respondents would be more than \$5.7 million. This figure does not necessarily reflect the reduction or elimination of services which has occurred or will occur, the reduction in maintenance of the municipal infrastructure, nor the elimination or reduction in capital improvements.

OSCC and AIO Statement
Hearing on Fair Labor Standards Act
August 28, 1985
Page Two

These resultant actions are occurring or will occur to varying degrees, much to the detriment of the citizens which the jurisdictions serve.

In summary and in conclusion, the State Chamber condemns this intrusion into affairs traditionally reserved by the Constitution for the states, and urges the prompt enactment of Sen. Nickles' S.1570 which essentially restores the exemptions set forth in National League of Cities v. Usery.


Jack G. Springer, CBE
Executive Vice President
Oklahoma State Chamber of Commerce

A RESOLUTION CALLING UPON THE CONGRESS OF THE UNITED STATES TO AMEND THE FEDERAL FAIR LABOR STANDARDS ACT IN ORDER TO ALLEVIATE THE UNDUE HARDSHIPS IMPOSED UPON UNITS OF LOCAL GOVERNMENT AND THE CITIZENS THEY SERVE.

WHEREAS, The United States Supreme Court, on February 19, 1985, issued a decision reversing a previous Supreme Court decision. The 1985 decision makes the United States Fair Labor Standards Act (FLSA) provisions applicable to state and local governments; and

WHEREAS, The Supreme Court decision makes all units of state and local government subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA). Accordingly employees covered by the Act must be paid for overtime work performed on or after February 19, 1985; and

WHEREAS, The cost of implementing the 1985 provisions of the Fair Labor Standards Act (FLSA) will have the following effect on sample units of local government in Southeastern Oklahoma: Hartshorne - \$44,000 additional; McAlester - \$250,000 additional; and, Pushmataha County - \$60,000 additional; and

WHEREAS, These costs will place an intolerable burden on local units of government who are already strapped for resources with which to meet their statutory requirements; and

WHEREAS, Local units of government in the State of Oklahoma already have a satisfactory arrangement of using compensatory time off with which to compensate employees who work longer hours than the normal forty (40) hour work week; and

WHEREAS, This arrangement has proven satisfactory both to employee and employer and gives greater flexibility and control to local governments and their employees; and

WHEREAS, Local units of government in Southeastern Oklahoma are already faced with reductions in numbers of employees with which to provide services to their citizens; and

WHEREAS, Implementation of the Fair Labor Standards Act (FLSA) provisions will further reduce numbers of employees of local units of government, thereby making an already critical situation impossible; and

WHEREAS, Financial actions have already been considered by local units of government in order to raise revenue to comply with Fair Labor Standards Act (FLSA) provisions; and

WHEREAS, A determination has been made that additional sales taxes, increased utility rates, and license fee increases would place an undue burden on those citizens least able to pay; and

WHEREAS, The Kiamichi Economic Development District of Oklahoma (KEDDO) is an organization comprised of member local units of government; and

WHEREAS, The Board of Directors of the Kiamichi Economic Development District of Oklahoma (KEDDO), acting in conjunction with, and on behalf of, its member units of local government, has made the determination that a further reduction of services would occur and that said reduction would further cripple Southeastern Oklahoma; and

WHEREAS, The Board of Directors of the Kiamichi Economic Development District of Oklahoma (KEDDO) has determined that provisions contained in the Fair Labor Standards Act (FLSA) would definitely cause a further reduction in the provision of necessary services by local units of government.

NOW, THEREFORE BE IT RESOLVED by the Kiamichi Economic Development District of Oklahoma (KEDDO) Board of Directors in an unanimous vote that the Congress of the United States be urged to act swiftly to amend the Fair Labor Standards Act (FLSA) in the manner proposed in S 1570, by Senator Don Nickles; and

BE IT FURTHER RESOLVED that the Kiamichi Economic Development District of Oklahoma (KEDDO) Board of Directors calls upon the Members of Oklahoma's Congressional Delegation to seek early approval of said legislation in order for local units of government of Oklahoma to go about the business of meeting the needs of the citizens of Oklahoma.

APPROVED AND ADOPTED by the Board of Directors of the Kiamichi Economic Development District of Oklahoma (KEDDO) on this 26th day of August, 1985.

Fred Crims

Fred Crims, Chairman

KIAMICHI ECONOMIC DEVELOPMENT DISTRICT
OF OKLAHOMA



ATTEST:

John Whetsel

John Whetsel, Secretary

A RESOLUTION CALLING UPON THE CONGRESS OF THE UNITED STATES TO AMEND THE FEDERAL FAIR LABOR STANDARDS ACT IN ORDER TO ALLEVIATE THE UNDUE HARDSHIPS IMPOSED UPON UNITS OF LOCAL GOVERNMENT AND THE CITIZENS THEY SERVE.

WHEREAS, The United States Supreme Court, on February 19, 1985, issued a decision reversing a previous Supreme Court decision. The 1985 decision makes the United States Fair Labor Standards Act (FLSA) provisions applicable to state and local governments; and

WHEREAS, The Supreme Court decision makes all units of state and local government subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA). Accordingly, employees covered by the Act must be paid for overtime work performed on or after February 19, 1985; and

WHEREAS, The cost of implementing the 1985 provisions of the Fair Labor Standards Act (FLSA) will have the following effect on sample units of local government in Southeastern Oklahoma: Hartshorne - \$44,000 additional; McAlester - \$250,000 additional; and, Pushmataha County - \$60,000 additional; and

WHEREAS, These costs will place an intolerable burden on counties who are already strapped for resources with which to meet their statutory requirements; and

WHEREAS, Local units of government in the State of Oklahoma already have a satisfactory arrangement of using compensatory time off with which to compensate employees who work longer hours than the normal forty (40) hour work week; and

WHEREAS, This arrangement has proven satisfactory both to employee and employer and gives greater flexibility and control to local governments and their employees; and

WHEREAS, Local units of government in Southeastern Oklahoma are already faced with reductions in numbers of employees with which to provide services to their citizens; and

WHEREAS, Implementation of the Fair Labor Standards Act (FLSA) provisions will further reduce numbers of employees of local units of government, thereby making an already critical situation impossible; and

WHEREAS, Financial actions have already been considered by local units of government in order to raise revenue to comply with Fair Labor Standards Act (FLSA) provisions; and

WHEREAS, a determination has been made that additional sales taxes, increased utility rates, and license fee increases would place an undue burden on those citizens least able to pay; and

WHEREAS, The Seven County Kiamichi Area County Commissioners Association is an association comprised of the County Commissioners representing: Choctaw, Haskell, Latimer, LeFlore, McCurtain, Pittsburg, and Pushmataha Counties; and

WHEREAS, The Seven County Kiamichi Area County Commissioners Association has made the determination that a further reduction of services would occur and that said reduction would further cripple Southeastern Oklahoma; and

WHEREAS, The Seven County Kiamichi Area County Commissioners Association has determined that provisions contained in the Fair Labor Standards Act (FLSA) would definitely cause a further reduction in the provision of necessary services by member counties.

NOW, THEREFORE BE IT RESOLVED by the Seven County Kiamichi Area County Commissioners Association in an unanimous vote that the Congress of the United States be urged to act swiftly to amend the Fair Labor Standards Act (FLSA) in the manner proposed in S 1570, by Senator Don Nickels; and

BE IT FURTHER RESOLVED that the Seven County Kiamichi Area County Commissioners Association calls upon the Members of Oklahoma's Congressional Delegation to seek early approval of said legislation in order for the counties of Oklahoma to go about the business of meeting the needs of the citizens of Oklahoma.

APPROVED AND ADOPTED by the Seven County Kiamichi Area County Commissioners Association this 26th day of August, 1985.

Oben Weeks

Oben Weeks, Chairman

SEVEN COUNTY KIAMICHI AREA COUNTY COMMISSIONERS
ASSOCIATION



JOAN HASTINGS
Tulsa County Clerk

Tulsa County Administration Bldg. • 500 South Denver
Tulsa, Oklahoma 74103 • (918) 584-0181

TULSA COUNTY
PUBLIC HEARING TESTIMONY
AUGUST 22, 1985
FAIR LABOR STANDARDS ACT

Prepared By

THE OFFICE OF TULSA COUNTY CLERK
JOAN HASTINGS

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JOAN HASTINGS
Tulsa County Clerk

Tulsa County Administration Bldg. • 500 South Denver
 Tulsa, Oklahoma 74103 • (918) 584-0181

SUMMARY REPORT

Tulsa County Public Hearing
August 22, 1985

On August 22, 1985, the Tulsa County Clerk, Joan Hastings, and the Tulsa County Commissioners Lewis Harris, Melvin Rice and John Selph held the Public Hearing in the Tulsa City Commission meeting room, 200 Civic Center, Tulsa, Oklahoma at 9:00 - 11:30 a. m. The Hearing was organized by Mrs. Hastings and chaired by Commissioner Harris.

The Hearing was held so that those affected by the Garcia Decision could explain the ramifications of the overtime ruling in their particular areas of concern. Besides Mrs. Hastings and the Tulsa County Commissioners, those hearing the testimony included Tulsa Police and Fire Commissioner Roy Gardner, representing the City of Tulsa; Doyce Boesch, Administrative Assistant in U. S. Senator Don Nickles' Washington office; Mike Morgan, Tulsa Field Representative to U. S. Senator David Boren; and Maxine Horner, Tulsa staff for U. S. Representative James R. Jones.

Elected officials and department heads, city managers, school superintendents, police and fire chiefs, volunteers and city employees from all towns in Tulsa County were invited to the Hearing via phone calls, follow-up letters and press releases. Also notified were the Tulsa Chamber of Commerce, Downtown Tulsa Unlimited, Tulsa Urban League, League of Women Voters and all newspapers, radio stations and television stations covering the Tulsa County area. **OVER ONE HUNDRED (100) PEOPLE WERE IN ATTENDANCE.**

Speakers were allowed three minutes to present their testimony. The list of speakers has been included in this report. **THERE WAS NO TESTIMONY IN FAVOR OF THE GARCIA DECISION.** The following is a synopsis of some of the speakers' comments.

Charles Gillespie, State Seminar Director for the State Auditor's Office gave a brief history of the Garcia Decision, what the ruling says and some warnings to administrators.

Terry Tallent, Tulsa County Personnel Director, presented a number of facts concerning the negative impact that the Garcia Decision will have on Tulsa County. Mr. Tallent said that the cost of overtime for a twelve-month period for fiscal year 1985-86 will be a sum total of \$226,071.00. This amount, he said, would be saved by the former practice of compensatory time.

Gordon Joens of the City of Tulsa's Personnel Department gave an even more alarming presentation of the negative impact the Decision will have on the City. **OVERTIME PAY WILL COST THE CITY OF TULSA \$1.3 MILLION FOR THE COMING YEAR.**

Mack Bettis, Chief Deputy of the Tulsa County Assessor's Office predicted a loss of \$15-20 million in ad valorem revenue.

Tulsa Police Chief Bob Dick said, "The Garcia Decision has the potential to do more harm to the Tulsa Police Department than any court decision in history." He said that the ruling could "destroy" the departments' recruitment program and push many young officers to leave police work. He explained that officers with less tenure must work the least desirable shifts, and they have used comp time to take long weekends and go to school.

Attorney Paul Karns said that when he was a policeman, he used comp time to go to school, get his law degree, and spend special occasions with his family.

Randy Orndorff of the Tulsa Fraternal Order of Police said its members had held a meeting the night before the Public Hearing to poll their members on the new ruling. "It was a unanimous vote to keep selective comp time instead of overtime pay," he said.

Dan Galloway, Owasso City Manager, said the ruling means a cut in services for small cities rather than an increase in expenditures and that the money simply is not available. The effect of the ruling has backfired and punishes employees who have consistently chosen time off rather than overtime pay, Galloway said.

Bixby City Manager, Paul Brignac, said impact on the City of Bixby this fiscal year will be \$50-75 thousand and will be even greater in the coming years. "The Garcia Decision causes a complicated, administrative nightmare which disproportionately affects smaller units of government," Brignac said.

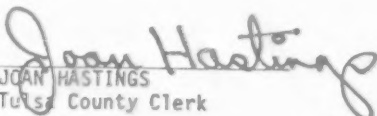
The Bixby City Manager expressed concern that the Garcia Decision will produce "anti-volunteerism in the public sector," and that "it may be necessary, in many cases, for the mutual aid agreements between cities and other entities to be cancelled."

Jerry Lasker, Executive Director of the Indian Nations Council of Governments, said twenty(20) communities in Tulsa, Osage and Rogers counties were polled and all opposed the Court's ruling. Because the ruling also requires local governments to pay for their time, many smaller towns with volunteer ambulance and police services face severe cutbacks, Lasker said.

Sand Springs Superintendent of Schools, Dr. Wendell Sharpton, warned of some of the problems the school systems will experience. He said, "we all want experienced, qualified bus drivers to take our children to out-of-town special events like football games, band competitions, etc., and that means overtime. Government budgets won't be able to pay."

After all speakers had been heard, Commissioner Lewis Harris polled the audience. "Is there anyone here who is for the Garcia Decision?" he asked. NO ONE WAS FOR THE COURT'S RULING.

Respectfully submitted,


JOAN HASTINGS
Tulsa County Clerk


LEWIS HARRIS, Chairman
Board of Tulsa County Commissioners

TO THOSE CONCERNED....

THE PURPOSE OF THIS REPORT IS TO PROVIDE THE EVIDENCE GIVEN AT A TULSA COUNTY PUBLIC HEARING FOR REVIEW TO THOSE INTERESTED IN THE U. S. SUPREME COURT'S RULING IN A CASE AMENDING THE FAIR LABOR STANDARDS ACT. THE CASE IS GARCIA VS. SAN ANTONIO MASS TRANSIT AUTHORITY AND IS OFTEN REFERRED TO AS "THE GARCIA DECISION."

EVIDENCE IS IN THE FORM OF A TRANSCRIPT OF THE HEARING AND TYPED INFORMATION RECEIVED BY THE TULSA COUNTY CLERK'S OFFICE AT THE HEARING.

NOTE: The complete text of this hearing can be found in the Senate Labor Subcommittee, 608 Senate Hart Office Building, Washington, D.C.

Senator NICKLES. I want to thank you all for this hearing, and we will adjourn the meeting. Thank you.
 [Whereupon, the subcommittee adjourned.]

FAIR LABOR STANDARDS AMENDMENTS OF 1985

TUESDAY, SEPTEMBER 10, 1985

U.S. SENATE,
SUBCOMMITTEE ON LABOR,
COMMITTEE ON LABOR AND HUMAN RESOURCES,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room SD-430, Dirksen Senate Office Building, Senator Don Nickles (chairman of the subcommittee) presiding.

Present: Senators Nickles, Wallop, and Matsunaga.

OPENING STATEMENT OF SENATOR NICKLES

Senator NICKLES. Good morning.

Today is the third day of 3 days of hearings on the impact of the Supreme Court's ruling in *Garcia v. San Antonio Metropolitan Transit Authority* on State and local governments.

To date, testimony on the loss of flexible scheduling by State and local governments due to federally mandated hour provisions has presented a strong, and in my opinion, almost overwhelming, case that the Federal Government has no business interfering with employer-employee relationships at the State and local level.

One example of the extremes to which this decision reaches was brought to the Labor Subcommittee's attention that I chaired in Oklahoma City on August 28. A constituent of mine, Rhonda Couch Swagerty, a single parent and mother of two small children, testified that in the mornings and afternoons, she drives a schoolbus for the Tahlequah school system. During the day, she is also a secretary for the same employer.

The *Garcia* decision now mandates that the two jobs be considered jointly for hours worked so that time and a half must be paid for all hours worked after 40 hours per week. The result is that the school system does not want to pay her time and a half, or could not afford to pay time and a half, and therefore, they gave her the option of selecting between the two jobs.

In other words, she was forced to select between the two jobs and could not maintain her bus driving additional job. That cost her an additional \$300 a month she was currently making and has forced her to now go on welfare. She indicated that she would like to have another job, but she certainly could not find one that worked into her schedule as accommodatingly, nor one that made as much money as she was making as a busdriver.

I think the effect of the *Garcia* decision in individual cases like this is a lot more far reaching than most of us, including this Senator, had ever anticipated.

To give another example, I recently toured a State school home in Enid, OK, where there were many individuals working under a Foster Grandparents Program. They are working to help mentally retarded children and probably receive pay around \$2.20 per hour. Under our study of this decision, they would become employees under the Fair Labor Standards Act and be subject to minimum wage, and therefore, the cost to the State and to those individuals would be substantial. The net result is that many of the senior citizens who are working in that program, which is an outstanding program where senior citizens are really volunteering their time, would be prohibited, or at least they would be mandated under the minimum wage standards. Many of those people would not be able to continue working in the Foster Grandparents Program.

I think there are a lot of ramifications from the *Garcia* decision which are just now being thought out and realized. I hope that Congress will move quickly to resolve this problem. We now have 30 cosponsors on the bill that I introduced, S. 1570, along with Senator Wilson. We hope to be able to move it through the Senate as quickly as possible.

We will enter into the record the statements of Senators Hatch and Quayle at this point.

[The statements referred to follow:]

OPENING STATEMENT OF SENATOR HATCH

I certainly want to commend Senator Nickles for holding this series of hearings on the efficacy of the Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority. As our witnesses today point out, coverage of state, county, and municipal employees under the Fair Labor Standards Act will require major changes in local accounting, payroll and compensation systems, and negotiated agreements with unions. Cutbacks in necessary local services are bound to occur due to the significant increase in labor costs brought on by the implementation of the new regulations.

I wholeheartedly agree with our witnesses this morning that Congress must act promptly to alleviate this predicament. We must restore the freedom of workers to bargain with their state and local government employers for pay and compensation packages which are mutually beneficial. We must unburden cities, counties, and states from still more directives from Washington, D.C. We should be tearing down the regulatory barriers to qualify police, fire, and other local services, not building additional ones.

Corrective legislation is badly needed to protect not only the financial interests of our local governments, but also their rights under the 10th Amendment to the Constitution, which guarantees that powers not specifically granted to the federal

government are reserved for the states. The ramifications of the Garcia decision go well beyond the variety of administrative problems noted by our constituents representing both local government associations and employee groups. A profound and lasting effect will be the federal infringement of state and local government sovereignty to manage their own affairs.

Obviously, Congress must rectify the mistake it made in 1974 in amending the Fair Labor Standards Act to include state, county, and city workers. Fortunately, the Supreme Court preempted the implementation of these new and arguably unconstitutional provisions with its decision in National League of Cities v. Usery. It is time now for Congress to repair its own damage as the court has removed its finger from the dike.

I will look forward to working closely with Senator Nickles to achieve expeditious passage of S. 1570.

Statement of Senator Dan Quayle
Before the Subcommittee on Labor
Committee on Labor and Human Resources
United States Senate
On Garcia v. San Antonio

Mr. Chairman, I appreciate the opportunity to make a statement at this third and final hearing on the impact of the recent Supreme Court decision in Garcia v. San Antonio. That decision held that public employees engaged in the performance of "traditional governmental functions" would be subject to the provisions of the Fair Labor Standards Act (FLSA). The impact of the decision in Garcia on Indiana would be two-fold. First, it will have a tremendous negative effect on the ability of our state and local governments to provide services to our citizens in a cost-effective manner. Second, it totally undermines the sovereignty of our state as well as every other state in the Union, and as stated by Justice Powell in his dissent "reduces the Tenth Amendment of the Constitution to meaningless rhetoric."

Mr. Chairman, in a 1976 decision, National League of Cities v. Usery, 426 U.S. 833, the Supreme Court struck down the 1974 legislation which used the commerce clause to mandate that the states comply with maximum hours and minimum wage provisions of the Fair Labor Standards Act. The Court held that the Tenth Amendment limits the commerce clause's applicability to the states and their political subdivisions when a state is involved in "traditional governmental functions" such as fire prevention, police protection, sanitation and public health. Setting wage and hour

laws for state and local government employees likewise falls within this parameter.

On February 19, 1985, the Supreme Court in Garcia overturned the 1976 decision and mandated that state and local governments comply with the provisions of the Fair Labor Standards Act. I am gravely concerned about the effect of this decision for the two reasons I mentioned above. I have other reasons for concern, as well, ones which have been brought to my attention by the people of Indiana.

Firefighters, police officers, psychiatric nurses and many other workers need, and want, compensatory time off from the stresses of their job. Other workers, involved in seasonal or volunteer work, prefer extra time off when the weather changes, season passes or the emergency or heavy work period is over. These people know that a firefighter cannot walk away from a raging fire, a police force cannot call off a manhunt nor fail to respond to a traffic accident. Likewise, a nurse cannot walk out of an operating room during an appendectomy and a snow plow operator cannot drive away from his job during a blizzard, just because his shift is up.

Many Hoosiers have written me about this problem. I have heard from elected officials and from teachers and nurses. I have gotten letters from mayors, fire chiefs and police chiefs, from firefighters and police officers. The vast majority do not like the effect of the Garcia decision. They prefer the time off because they can enjoy extra time with their families without using vacation or personal leave. They prefer time off because they know that state and local governments will reduce services, squeeze other governmental functions, they will hire part-time workers or they will hire other full time workers, but

they will avoid paying penalty wages if at all possible. Our public employees know that Garcia does not mean they are getting a raise. It simply means that they cannot get compensatory time off any longer.

In addition, the requirements imposed on state and local governments to implement the Garcia decision, will be unnecessarily burdensome and confusing for already overburdened state and local governments. In many instances, its effect will be in direct conflict with current agreements between employees and local governments. As I indicated, before Garcia, the provisions of FLSA did not apply to state and local government employees engaged in "traditional governmental functions." These employees were able to bargain or contract with their local municipalities for overtime and/or compensatory time off. The requirements that will be imposed on state and local governments by the decision of the Supreme Court in Garcia will add little value to local government services, yet will end up costing the taxpayers substantially more.

Mr. Chairman, I hope the Senate will move quickly to adopt S. 1570, your bill to amend the effect Garcia decision. The federal government's decreasing role in helping to pay for the rights it creates may be too much for the states to withstand. I am proud to be a cosponsor of S. 1570 and I encourage all our colleagues who have not yet cosponsored this bill to join us.

Senator NICKLES. Today, we have an outstanding group of witnesses to share with us their experiences and expertise on this issue.

Our first witness is William Bradford Reynolds, Assistant Attorney General, Civil Rights Division, representing the Department of Justice.

STATEMENT OF HON. WILLIAM BRADFORD REYNOLDS, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. REYNOLDS. Thank you, Mr Chairman.

I want to tell you how much I appreciate the opportunity to appear here today to testify on this particular subject on behalf of the Attorney General and the Department of Justice, at this very important hearing that does concern the impact of *Garcia v. San Antonio Metropolitan Transit Authority* on the application of the Fair Labor Standards Act to employees of State and local governments.

As we all know, by a 5-to-4 decision, the Supreme Court held in *Garcia* that the wage and hour standards of the Fair Labor Standards Act are fully applicable to State and local governments, as provided in the 1966 and 1974 Amendments to the Fair Labor Standards Act.

The Court thus overruled *National League of Cities v. Usery*, which held that the 10th amendment precludes application of the Fair Labor Standards Act to the traditional governmental functions of the States. In a sweeping opinion, the majority in *Garcia* took the position that because the States' interests are, in the Court's view, adequately represented in Congress, the Court would not question Congress' judgment in applying the Fair Labor Standards Act to the States. Four Justices dissented and criticized the majority's reasoning in the strongest terms; and it seems clear that they, at least, are prepared to overrule *Garcia* if given an opportunity in the future.

Although the Justice Department argued in *Garcia* that the Fair Labor Standards Act applies to employees of a public transit authority, we were deeply disappointed by the Court's reasoning in *Garcia*. The decision essentially reads the 10th amendment out of the Constitution as an effective limitation on the power of Congress to regulate the States under the Commerce clause.

In fact, the 10th amendment receives only passing mention in the majority's opinion. The Court's reading out of the bill of rights a provision expressly reserving powers to the States stands in stark contrast to its reading into the bill of rights in other cases various individual rights that are nowhere to be found in the text.

The Court's decision goes beyond the misinterpretation of an isolated constitutional provision. It misapprehends the fundamental role of the States in our system of government. According to the *Garcia* majority, States apparently enjoy no special constitutional autonomy in relation to Congress. They are now held as nothing more sovereign than ordinary private entities when Congress seeks to flex the awesome muscle of its power to regulate commerce.

But the States are far more than administrative prefectures operating under congressional direction. The Framers intended that State and local governments would be a buffer against the centralizing tendencies of the Federal Government and the threat to our liberty that those tendencies present. The various debates during the Constitutional Convention produced, as James Madison put it in the *Federalist*, a government that was neither wholly Federal nor wholly National, but a composition of both. Half a century later, Alexis de Tocqueville would celebrate "democracy in America" as precisely the result of the political vitality spawned by this "incomplete" National Government.

The institutional design was to divide sovereignty between two different levels of political entities: The Nation and the States. This would avoid an unhealthy concentration of power in a single government. It would provide, as Madison said, a "double security * * * to the rights of the people." Federalism, along with separation of powers, the framers thought, would be the basic principled matrix of American constitutional liberty. "The different governments," Madison concluded, "will control each other; at the same time that each will be controlled by itself."

But institutional restraints on power was not all that federalism was about. There was also a deeper understanding among the framers—in fact, a far richer understanding—of why federalism mattered. And it is this understanding that is too often lost in our judicial shuffles and legal squabbles over federalism.

When the delegates to Philadelphia convened almost 200 years ago, in May 1787, to revise the ineffective Articles of Confederation, it was a nearly foregone conclusion that the basic debate would concern the proper role of the States. Those who favored a diminution of State power, the Nationalists, saw unfettered State sovereignty under the articles as "the" problem; not only did the Articles of Confederation allow the States to undermine congressional efforts to government, it also rendered individual rights insecure in the hands of "interested and overbearing majorities."

Indeed, Madison, in defending the Nationalists' constitutional handiwork in the *Federalist*, went so far as to suggest that only by a "judicious modification" of the federal principle was the new Constitution able to remedy the defects of popular, republican government.

But to those who doubted the political efficacy of the new Constitution—those whom we may call the confederalists—a too severe modification of the federal principle would damage the new Nation. In their view, good popular government depends quite as much upon a political community that would promote civic or public virtue as on a set of institutional devices designed to check the selfish impulses of the majority. As Herbert Storing has shown, this concern for community and civic virtue somewhat tempered and tamed the Nationalists' tendency toward simply a large nation. Their reservations, as Storing put it, echo still through our political history.

Today, it is this understanding, that federalism can contribute to a sense of political community and hence to a kind of public spirit, that is too often ignored in our public discussions about federalism. But in a sense, it is this understanding that makes the American

experiment in popular government truly the novel undertaking the framers thought it to be.

By recognizing the States' sovereignty and preserving their ability to govern, we better secure our ultimate goal of political liberty for all Americans through decentralized government. Let there be no mistake on one point, however. The administration does not advocate States rights in any narrow or negative sense; we advocate States' responsibilities. And in the vast majority of cases, State and local governments have managed their affairs in a fully responsible fashion by reaching agreements with their workers, by providing services to their citizens at cost acceptable to their taxpayers, and by securing justice for their inhabitants.

While the damage to judicial application of the constitutional doctrine of federalism caused by *Garcia* will likely remain until the Supreme Court can be persuaded to remedy it, the Court's reliance upon Congress as the sole bulwark against Federal encroachment means that the direct, practical harm of the *Garcia* holding can be undone only by legislation. Even if not constitutionally required to do so, Congress should, for sound policy reasons, reserve to State and local governments the authority they need to manage their own affairs.

Federalism is at the core of our constitutional system, a principle that is reflected not just in the 10th amendment, but throughout the structure of our Constitution. Thus, it is not only up to the Federal courts to be faithful to federalism; it is also up to the executive and legislative branches of the Federal Government to acknowledge and strive to preserve State sovereignty. That, we submit, is exactly what your bill and these hearings are all about, Mr. Chairman. Therefore, if we are to remain true to fundamental principles of federalism, legislation redressing the injury caused by *Garcia* must be passed.

Application of the Fair Labor Standards Act to State and local governments creates many problems for them. These problems have been identified during your hearings and will be addressed specifically by the Secretary of Labor in his testimony following mine.

Of particular concern to the Justice Department are the serious problems created for State and local law enforcement. For example, the most important time for police work following a murder is the 24 to 36 hours immediately following the crime. Many investigators literally work around the clock when starting such a case. Similarly, firefighters must fight fires when they are burning. The strict 40-hour week mandated by the Fair Labor Standards Act was adopted for factory workers who produce goods on an employer's schedule; it simply is not applicable to employees who work in response to external events.

The negative effects caused by *Garcia* are evident. We believe that Congress has a responsibility to provide relief from these effects to State and local governments. We commend you, Mr. Chairman, for promptly introducing legislation, S. 1570, to provide such relief and for holding these hearings to develop a record of *Garcia* impact and to consider legislative remedies.

We endorse Senate bill 1570 as an excellent vehicle for providing needed relief. The soundness of its approach is evidenced by the

strong endorsement that the bill has already received from State, county, and local governments. The whole point here is that it is not the place of the Federal Government to dictate rules and solutions to problems when the States are best able to understand the situations they face and to act accordingly. Here, State and local governments are best situated to consider and explain how application of the Fair Labor Standards Act to them will interfere with vital operations and services and to structure appropriate legislative remedies.

In summary, we support Senate bill 1570 and will defer to State and local governments for any necessary technical changes. We look forward to arriving at a solution that will guarantee the necessary sovereignty of the States and preserve their ability to provide needed services at a reasonable cost on terms that are mutually acceptable to voters and workers.

That concludes my prepared statement, Mr. Chairman, and I will be pleased to answer any questions you might have.

Senator NICKLES. Thank you very much, Mr. Reynolds.

We are pleased to have Senator Wallop join us this morning. Senator Wallop, do you have any comments?

Senator WALLOP. Yes, thank you, Mr. Chairman.

Mr. Reynolds, I very much appreciate that statement on federalism being the inherent strength of the American political process. One of the things that is amazing is that, while the press has slept, the State governments of this country have become the efficient deliverers of freedom and the efficient deliverers of government. While Congress seems to be frozen by "beltway" conventional wisdom, incapable of taking even the simplest of acts, the State legislatures have really begun to manage their affairs in ways which ought to be the envy of Congress.

I think there was, in of all places, the Washington Post this weekend, an article to that effect, whether it was caused by budget cuts, which I doubt because I, having been a member of the State legislature long before budget cuts were popular, saw them beginning to reform their processes all over the country, and a number of organizations at that time, from the midsixties until about 1980, were designed—some of them still survive—to help State governments become effective governments. And they reformed themselves enormously during that 15-year period, all across the country.

So I have no fears that these responsibilities as you describe them in your statement, would be fairly and efficiently delivered, as they were before the Supreme Court decision.

I guess my question goes a little farther. Why should we, in this day and age, limit ourselves under the Fair Labor Standards Act, just to State and local government. Why is it not now the position of labor, of this Government or any other government, to follow a little farther than Senator Nickles' proposal into my proposal, which says that people who bargain together can bargain for the workweek they wish, the work structure. If that is compensatory time, because of a variety of interests, and that is what they want, why shouldn't they be permitted to do it?

It strikes me that now is a different time than when the Fair Labor Standards Act was passed. There are a lot of family people

in this country who prefer time with their families and long week-ends to overtime compensation, yet we prohibit it.

I got interested in this 3 years ago, because a firm in Cheyenne, WY, that has a lot of women employees was not permitted under the act to work the longer-than-8-hour day and provide compensatory time, because of the law, and yet, that is what the people wanted, and their work cycle was such that they had heavy periods of labor demand, and that is exactly why those people chose to work there, so they could have the longer periods of time with their families, in many respects. And it was the employees, not the employer, who asked me to look into this.

So I guess my question is, In a modern era, where family values are important, where the work circumstance of Americans has changed dramatically, if people wish to make that arrangement in the bargaining place, shouldn't they be allowed to do so?

Mr. REYNOLDS. Well, that is certainly a separate question than the one we are visiting here. I think that it is one that Congress can legitimately take up and consider and certainly could be a subject of a different set of hearings.

Senator WALLOP. Well, I am not certain. I mean, admittedly, you were called here to testify on S. 1570 and the *Garcia* case as to its relationship to State and local government employment. But in effect, why should that privilege be reserved to the employees of State and local governments, when others in America want it, too?

Mr. REYNOLDS. Well, all I was suggesting, Senator, is that I think it is a legitimate area which Congress should go into. I think in this particular instance, we have a rather dramatic and widespread response by State and local governments to a specific decision of the Supreme Court that I think does indeed impinge quite considerably on State and local services and State and local functions that are traditionally of that sort; and it is in response to that particular response by State and local governments to the Supreme Court that this legislation has been devised. Our sense is that we think considerable deference should be given to State and local governments with regard to their concerns. I think that if there are additional concerns such as you have suggested, they are a very proper area for deliberation and consideration by Congress. Whether tied into this particular initiative or not is, it seems to me, a bit of a different question.

Senator WALLOP. Well, I guess I don't quarrel with that in part, but then it leaves us focused on a very narrow thing, with State and local governments as the employer, without regard to the employee. And much of the testimony we had in the first hearing from State and local government employees was that they wanted it, too.

I guess if we are going to look at it from the perspective that it drops in our laps, one, you have the Federal question, which I totally agree with you on—and I somehow or another find myself still sort of startled by the reasoning or lack of it that was in the Supreme Court decision—I do not like to have this end out as a focus on only employers, because then you do give a legitimate question to those labor types who will be following along who will say that this is a threatening circumstance to them, that it is, in fact, something which the employees of State and local governments, by and

large in this country, wish, to say nothing of the ordinary efficiency of delivering government. I made the point that it is very difficult for me to see how anybody is going to clear a road in Wyoming of snow in the wintertime, and we have already started on that program. If the 8-hour day prevails, it is going to take them damn near that long to come back from where they started to plow. That seems sort of obtuse, when it comes right down to it.

Anyway, I very much appreciate what I consider to be an eloquent statement on the principles of federalism and U.S. governmental history. We sometimes forget what kind of government it was that we set up that we so much treasure, and to walk off from that is to lose part of that treasure.

I thank you.

Senator NICKLES. Senator Wallop, thank you.

Mr. Reynolds, I think you make a very eloquent argument based primarily on the 10th Amendment to the Constitution. The Supreme Court—and correct me if I am wrong—when they made their decision in 1976, was based on the 10th amendment, or at least the thrust of the majority ruling in 1976 was that these rights and powers under the 10th amendment would be reserved to the States and to the people.

I, for one, have felt many times, that we either from the legislative body or through the judicial system, ignore the 10th amendment, and take it upon ourselves to make decisions that the Constitution clearly reserved to the States and the people.

Would you think this is one excellent case of where the courts have gone in and kind of ignored the 10th amendment?

Mr. REYNOLDS. Well, it certainly does appear that the majority did not, give due regard to the 10th amendment. It only made passing reference to it in the *Garcia* case. And I think fundamental to that deficiency is that the majority opinion seems to be less aware of the basic federalist concept that was put into the Constitution by the framers as an essential underpinning. The Constitution is really a document that limits powers of the National Government and reserves powers to the States, giving only limited powers to the Federal Government, and I think what one has to appreciate much more fully than the majority seems to, is that the sovereignty of the States which is embedded in the 10th amendment and part of the 10th amendment is a fundamental part of the constitutional construct, and part of the genius of the Constitution is that it indeed does recognize and preserve that sovereignty. I think that the *Garcia* majority tends to give very short shrift to that underpinning of the Constitution and, I think as the dissents point out, fails woefully to take into account the historical backdrop of the framers and the Constitution, as it was devised, and the whole reason for the Bill of Rights and the 10th amendment as part of that Bill of Rights.

I think the *National League of Cities* decision was bottomed on the 10th amendment, and I hope that at some point, the courts will return to a full recognition of the force of that amendment.

Senator NICKLES. I would agree with that.

You also mention in your statement—and it is an interesting point—that the majority took the position that because "States' interests are, in the Court's view, adequately represented in Con-

gress, the Court would not question Congress' judgment in applying the Fair Labor Standards Act to the States."

You know, I read that comment out of the statement and I look at some of the implications of this decision, and I cannot help but wonder if the courts really meant to do what they are doing.

In the Tulsa Police Force, they give comp time or overtime; they give it basically to the option of the employees. The employees love to have that option. By the Court's decision, and the way it is being implemented, they lose that option; they are forced or mandated to take overtime. They do not have a comp time option. As Senator Wallop mentioned, a lot of the employees want to have comp time as an option; many times, it is the preferable option—maybe not in every circumstance. I personally do not care. I just think that those decisions should be made on the State and local level and not be mandated by a Supreme Court decision.

Do you agree with that?

Mr. REYNOLDS. Yes. I think that is absolutely right. And the part of the testimony that you have made reference to indicates that the majority of the Court really has, I think, eliminated an awful lot of the local authority that was preserved by the 10th amendment, by suggesting that it is simply a matter for the Federal Government to tend to, and if it can be legislated in the Congress here in Washington, then it is subject to the powers of the Federal Government, and the State autonomy is lost. I think that really does lose sight of the fundamental construct that the framers of the Constitution had in mind and were really very adamant, in terms of how they framed the Constitution, to preserve.

Senator NICKLES. Mr. Reynolds, I appreciate your appearance before the committee and also your statement today.

Senator Wallop, do you have any comments?

Senator WALLOP. No, Mr. Chairman.

Senator NICKLES. Thank you very much, Mr. Reynolds.

Our next witness is Francis X. Flaherty, mayor of Warwick, RI.

Mayor Flaherty, we are very pleased to have you. Senator Pell had hoped to be here, and he requested that I make this statement, which I will read in his behalf. He says,

Mr. Chairman, I am delighted to introduce the Mayor of my State's second-largest city, Mayor Francis Flaherty. Mayor Flaherty, who was elected Mayor of the city of Warwick in resounding fashion last November, after a very distinguished career on the City Council, is providing vigorous and imaginative leadership to the city.

He is very happy that you are here today.

I am sure that in his testimony today, Mayor Flaherty will provide this subcommittee with new and important insights into the situation resulting from the Supreme Court's decision in *Garcia*.

As we continue to study the Supreme Court decision, I welcome Mayor Flaherty's testimony, for I know he will describe with precision and candor the serious concern that this decision has caused for State and local governments and for the chief executives, such as the Mayor.

So, with that, please proceed.

STATEMENT OF HON. FRANCIS X. FLAHERTY, MAYOR, WARWICK, RI, ACCOMPANIED BY DANIEL E. SILVA, PRESIDENT, WARWICK FRATERNAL ORDER OF POLICE

Mayor FLAHERTY. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, I am Francis X. Flaherty, mayor of the city of Warwick, RI, and I am appearing before the subcommittee today to testify in behalf of the National League of Cities regarding the impact of the Fair Labor Standards Act, the FLSA, on cities and the need for immediate congressional action.

The Supreme Court's February 19, 1985 decision in *Garcia v. San Antonio Metropolitan Transit Authority*, extending the provisions of the Fair Labor Standards Act to cities, will cost the city of Warwick, a city of about 90,000 people, at least \$600,000 per year. Perhaps more important, it will require the termination of a wide range of employment practices which have proven to be beneficial for both the city and its employees.

The *Garcia* decision will do nothing to advance one of the objectives of the overtime provisions of the FLSA originally contemplated by Congress—the expansion of the number of jobs. The primary effect of the *Garcia* decision is that the cost of operating Warwick's police and fire departments will increase by \$300,000 per year. It will not result in the hiring of additional employees, because we do not have the funds.

We are faced with the Hobson's choice of increasing taxes or reducing services. The timing of the imposition of this new legal mandate could not be worse. It comes at the same time as Congress is considering the termination of the General Revenue Sharing Program and also considering the elimination of the deductibility of State and local taxes.

Moreover, the cost of complying with the overtime provisions of the FLSA have been imposed on Warwick at the same time as the cost of operating a city are increasing and Federal assistance has dropped dramatically. As a result, our ability to raise additional revenues is very limited.

Specifically, the FLSA means \$180,000 in additional costs for special detail work by police officers and \$60,000 in additional costs for the police department as a result of the termination of the compensatory time under the FLSA.

Additionally, we expect to incur substantial new costs for record-keeping and data processing in the police department and other city departments. We will also incur at least \$50,000 in new costs for the fire department and \$97,000 for other municipal employees.

Also in Warwick, we have a police reserve force which provides 12,000 hours of volunteer work a year in the community. Police reservists provide vital community services, such as helping to search for lost children, directing traffic at churches, and directing traffic at community events.

Under the provisions of the FLSA if they are applied to cities, the reservists must be compensated whenever they provide volunteer services which are in any way similar to police work. As a result, we can no longer rely on the police reserve force for volunteer service.

I would like to discuss three areas in which the overtime provisions of the FLSA are incompatible with longstanding municipal employment practices, many of which are embodied in collective bargaining agreements and civil service laws. There are many additional problems caused by extending the act to cities; however, the

examples I am discussing today are the best illustrations of the unworkability of the FLSA as it applies to city employees in its present form.

First, the Department of Labor's regulations define the city as a joint employer when police officers take special duty assignments in the community, for which they are paid separately by the people who contract for them. The effect of this requirement is that the hours which the police officer works for the city and the hours which he works on his own on a special duty assignment must be totalled, and liability for overtime compensation calculated on the basis of the total number of hours worked for the two jobs. In other words, special detail assignments can no longer be treated as separate employment. In Warwick, this provision of the regulations means that the hourly special detail rate will be increased from \$12.05 per hour to \$16.41 per hour, an increase of about one-third.

In fact, our own police union, Fraternal Order of Police Local No. 7, is opposed to the Fair Labor Standards Act provisions affecting special detail work because it will severely curtail their members' ability to do private work and to earn additional income. Our local union has the right to negotiate through the collective bargaining process the hourly rate for detail work. These rates do not change unless done so in the collective bargaining process.

For the individual members of the union, special detail work is important because of the peculiarities of the police schedule, and the work available in the private sector. This will result in an unnecessary loss of a vital community service and will affect the quality of the service, in addition to taking money from the pockets of our police officers.

And I will mention, Mr. Chairman, that I have with me today the president of our local FOP, who has come down to show his support for the city's position. That is Officer Daniel Silva, on my far right.

Second, the FLSA prohibits the use of compensatory time off in lieu of overtime pay in Warwick and in other cities. The only circumstances in which anything like compensatory time can be used is under the so-called time off plan. The time off plan cannot be used in Warwick, because we have a 1-week pay period. Under the time off plan, an employee who works overtime in the first week of a 2-week pay period may be compensated by reducing the number of hours of work in the following work week by the number of overtime hours worked in the prior week times one and a half.

The time off plan is of little or no use to Warwick because of our weekly pay period, and of very little utility to those cities with 2-week pay periods. First, it cannot be used at all to counterbalance overtime hours that are worked in the second week of a 2-week pay period. Second, it would be an administrative nightmare. And third, it does not provide the city with sufficient flexibility to respond to emergencies, such as snowstorms or other natural disasters, which tend to be concentrated in time.

It should be recognized that compensatory time is as beneficial to the employee as it is for the employer. The employee is provided with the opportunity to augment annual leave with the additional time accrued in the form of compensatory time. By combining the two, the employee can take extended vacations, or cash out the

compensatory time upon retirement. In other words, compensatory time provides both the employee and the employer with scheduling flexibility.

Significantly, our employees have sought to protect compensatory time in their collective bargaining agreements. Additionally, it provides the city with the ability to control the costs of overtime and to deal with seasonal fluctuations.

Third, the act requires that the regular rate, or hourly rate, which serves as the basis for calculating overtime compensation, be determined by adding nondiscretionary bonuses to the regular salary or base pay. In some cases, as in the case of longevity bonuses, this requirement means that overtime pay must be retroactively recalculated. Because complex compensation agreements have evolved in the public sector, providing a wide range of incentives in the form of education, longevity, and productivity bonuses, many cities will be required to calculate the regular rate for each employee on an individualized basis.

It is important to note that compensation arrangements, including longevity and incentive bonuses, comp time plans, and work schedules are generally matters for negotiations between the employer and the bargaining unit representing the employees. In fact, in Warwick, as in many cities throughout the country, all of these matters are established through the collective bargaining process. The effect of the *Garcia* decision and the applicability of the FLSA to cities is to make certain matters such as compensatory time non-negotiable and to limit the parties' ability to negotiate over their own matters, particularly work schedules. Because the city's ability to negotiate over matters of fundamental importance to employees—such as compensatory time and work schedules—is curtailed, the *Garcia* decision will eventually have the effect of forcing cities to incur higher labor costs, with no additional services provided to the public.

In our city, all nonmanagement employees are represented by collective bargaining units. Our employees have always enjoyed substantial bargaining rights during contract negotiations with the city. For example, the base salary is \$23,000 for an average police officer, and \$24,500 for an average firefighter. While I cannot speak for other jurisdictions, the salaries for our employees are at least consistent with the national average.

The effect of the *Garcia* decision is to hamstring the city in negotiations with its employees. We cannot negotiate over schedules to any significant extent because of the limitations of the 40-hour work week and of the section 7(k) partial exemption for police officers and firefighters. Similarly, we cannot negotiate over compensatory time, and it would be prudent from a bookkeeping perspective to limit nondiscretionary bonuses and other nonstandard types of compensation.

I urge immediate congressional approval of S. 1570, which would exempt cities from the overtime provisions of the FLSA. Under this bill, cities could continue to negotiate with the employees over work schedules, nondiscretionary bonuses, and compensatory time. These matters are of fundamental importance to both the city and its employees and should be left to the negotiating table for resolution at the local level. From my perspective, I cannot see any

reason for applying the FLSA to cities where the employees are protected by the collective bargaining process.

The day of reckoning for cities is fast approaching, as the Department of Labor prepares to begin enforcement activities on October 15, and the number of lawsuits filed by employees mounts. In fact, it is my understanding that some of the employee lawsuits are designed to prevent cities from complying with the FLSA where the act is in contravention of the collective bargaining agreement.

For example, I understand that there is a lawsuit that has been filed in Texas by city employees to force the city to comply with the provisions of an existing collective bargaining agreement which allows for the use of compensatory time, even though compensatory time is not permissible under the FLSA.

The failure of Congress to act will inject uncertainty and confusion into employer-employee relations, as many longstanding employment practices are terminated or significantly altered. It will mean that taxes must be increased and/or public services reduced. It will unnecessarily burden cities during a period of financial difficulties. It may even mean that, in some cases, police officers and firefighters will be laid off in order to reduce costs.

If 1570 or similar legislation is not enacted, the ultimate losers will be the taxpayers. This bill, or legislation like it, is essential to allow for the continued use of volunteers by cities and allow for the establishment of work schedules and compensation arrangements at the local level through the collective bargaining process.

Senator NICKLES. Mayor, thank you very much for your comments. I appreciate your support for the legislation. You are also representing the National League of Cities?

Mayor FLAHERTY. Yes, I am, Senator.

Senator NICKLES. I appreciate that.

You mentioned the size of your city 90,000?

Mayor FLAHERTY. About 87,000, Senator.

Senator NICKLES. And you have calculated the cost of compliance as being how much per year?

Mayor FLAHERTY. It could reach \$600,000.

Senator NICKLES. I heard you mention that you have a negotiated agreement with your city employees, firemen, policemen, city workers, and so on. Are they pleased—and I am assuming in your negotiated agreement with city employees, you have comp time in as an option, or do you only use comp time or, do you use overtime and comp time?

Mayor FLAHERTY. We use overtime and comp time, and with most of our collective bargaining agreements, it is at the option of the employee.

I heard Senator Wallop refer to that in his comments to the previous witness. All of our bargaining units provide for compensatory time, and it is up to the employee whether or not he wants to take compensatory time or overtime. And many of the employees, particularly in our municipal union, and particularly the women, would prefer to take the compensatory time rather than the overtime.

Senator NICKLES. As a result of the *Garcia* decision, you are basically prohibited from offering comp time as an option?

Mayor FLAHERTY. My understanding is that the Department of Labor will fine us if we continue to allow compensatory time, whether the employees want it or not.

Senator NICKLES. That is correct.

You also have a situation, since you have established or negotiated these agreements for a period of 1, 2, or 3 years, that you now have to abrogate those decisions and rewrite those contracts, or else be in violation of *Garcia* and subject to fine.

Mayor FLAHERTY. That is true, Senator. All three of the major unions that I negotiate with have 2-year contracts that begin on July 1, 1985. They would all have to be altered in some way. We did know that the specter of the *Garcia* decision was on the horizon. We tried to provide for some flexibility in the agreements, to reopen on those issues if it became a fact. My view of the problem with the FLSA is that it provides for individual rights for employees. However, particularly in our region of the country, in the Northeast, virtually all public employees have collective rights, and there seems to be discrepancy or a contradiction between the individual rights that are protected by the FLSA and the collective rights that have been negotiated for and agreed to in collective bargaining agreements. We have 168 men in our police department. They are all members of the union. If 167 of them want to be exempt from *Garcia*, and one of them wants to sue us, he can sue us, and we will be fined to boot. So the act would have certainly devastating effects on both the employer and the employee side of the collective bargaining agreement.

Senator NICKLES. You mention in your statement the threat or possible liability of litigation. One of the things that we have, as you are probably aware, is we move the effective date back to the *Garcia* decision date, which hopefully would eliminate the massive amount of suits that we see forthcoming. We are quite aware that many cities, counties and States are not going to be complying. They will continue to offer comp time because again, that is what the majority of their employees and employers have come to agree. They like the system as it is, and they do not really want to change it.

Mr. Silva, you are president of the FOP for the city of Warwick?

Mr. SILVA. Yes, I am, Senator.

Senator NICKLES. Do the officers like having that option of being able to take overtime or comp time?

Mr. SILVA. Yes, they do. That is one of the biggest issues every time we negotiate with the city. As a matter of fact, this past year, we boosted it up, the limited amount of hours that employees could keep on the books, they doubled it. That's how much the members of my union want comp time.

Senator NICKLES. Well, I understand that, and I will just echo that that is what I have been hearing in my State of Oklahoma. The option of overtime or comp time, has been negotiated and in many cases, the preference was the comp time. You were talking about individual rights. That is the maximum flexibility for the individual and for the city, if they can work it—the best of both worlds, to where they can accommodate scheduling and also accommodate costs and so on.

Mayor FLAHERTY. That is right. The effect is, Senator, that the employees have achieved a great deal of individual rights through that collective bargaining process. That is completely within the discretion of the employee.

Senator NICKLES. And Garcia will basically take away that flexibility.

Mayor FLAHERTY. Yes, it will.

And something else that I think may be peculiar to us, though perhaps not—our police officers work a lot of special details, as I mentioned earlier in my comments. They negotiate period detail rates with the city. The city however does not pay for the special detail work. A construction company doing road work, or a liquor store that wants security for example will pay for special detail work. We just handle the money paying the officer and collecting from the vendor.

The officers are concerned that if they receive time and a half for special detail work, they will price themselves out of the market. Time and a half for them is \$16.50 an hour. They do that special detail work at \$12 an hour. They want to do it at \$12 an hour so they can keep themselves working. Because of the peculiarities of a police department schedule, which is four days on and two days off, it is very difficult for a police officer to have a part-time job, because his days off rotate each week. But he can do that special detail work, and he can help support his family by doing it, and it is at no cost to the city. And certainly, we like having police officers directing traffic, rather than private security people, or flagmen, as are used in other parts of the country. There it is a certain benefit to the public even if the police officer is not working for us, even if he is on his own time and doing it as a part-time job, to have that police officer there in uniform. He is happy receiving the amount of pay that he received prior to *Garcia*. He has negotiated that amount of pay through his union. Now, the *Garcia* decision would force us to charge the private vendors in the community another \$4 an hour. We do not want to do it. They do not want to do it. Certainly, the community businesspeople do not want to pay it. The effect is going to be that either the community will pay more for the services, or that the work will become less available to the police officers.

Also very important to us, is the volunteer forces that we have. We will not be able to have people direct traffic at church on Sunday without paying them what an officer would make at time and a half. The police reservists like to do that volunteer work. Some of them like to wear their uniforms; some of them like to think of themselves as part of the police department. Some of them like to think of themselves as providing community services. We would have to disband that organization, which has brought us nothing but good will and praise for the last 25 years.

Senator NICKLES. I think the point you make as far as volunteers, and we have not heard about that from too many of our witnesses, is well-taken, and probably the one that is least understood. It could have a very, very dramatic negative impact on communities all across the country.

You mentioned the type of detail work. Is that like a police officer being involved in traffic around the football game, and so on?

Mayor FLAHERTY. Yes. Again, we have negotiated with the FOP the types of work that the volunteers can do. That is always a labor issue, with somebody else doing the work of the members of the bargaining unit. But within our collective bargaining agreement with the regular members of the FOP, there are certain—I think there are nine of them—enumerated tasks that the volunteers, the police reserves, can undertake. Everybody is happy with it. We certainly get the benefit of having additional people and additional police visibility. It is nice to be able to offer people protection crossing the street to church on Sunday morning; if there is a football game, or if there is a concert at the city park—it is nice to be able to offer that, and not have to pay \$16 or \$18 an hour for it. The FOP supports it; certainly, the volunteers like to do it, and the community loves it. We would have to disband that organization, in my view, if we had to pay them time and a half at the policeman's rate.

Senator NICKLES. That is very similar to the story I related at the opening of the hearing, of the person who had two jobs working in the school system, one as a secretary and one as a bus driver, who had to suspend with that extra job.

I appreciate your comments.

Senator Wallop, do you have any comments?

Senator WALLOP. Just two observations. One, I think that this was a very useful and well-articulated statement. It is going to all the functions that ought to be involved in any kind of a labor agreement, anyway—especially with regard to State and local governments, the people they serve, and the people who serve in that function. It seems to me everybody is the loser—the public employees, the city itself, and the people who elect them.

You were saying that you are faced with a Hobson's choice of increasing taxes or reducing services—at least Hobson has a choice. In my home county, this is going to cost \$600,000 about the same as yours, because of—not just the police work, but in the county's budget—and we have just lost 46 percent of our tax base with the mines shutting down. So, there is no choice but to reduce services. There is nothing left to pay.

Mayor FLAHERTY. Philosophically, Senator, there is always the choice of reducing services or raising taxes, but practically speaking—

Senator WALLOP. If you have lost 46 percent of your tax base, you are going to have a choice of raising taxes—there isn't any to raise. You can raise it a little and reduce them slightly less. But I mean, our choice is how much do we ultimately reduce. And there, the public is clearly out, and there, too, are the employees clearly out, because it is going to mean some of them do not have a job at all. And that seems peculiarly shortsighted in terms of what the Fair Labor Standards Act was supposed to accomplish.

I thank you for your statement.

Mayor Flaherty. Thank you.

[The prepared statement of Mr. Silva follows:]

WARWICK LODGE NO. 7



LEO D. SLOAN MEMORIAL HOME
P.O. Box 241 Warwick, Rhode Island

Statement of

DANIEL E. SILVA

PRESIDENT, WARWICK LODGE #7

FRATERNAL ORDER OF POLICE

on behalf of

THE NATIONAL LEAGUES OF CITIES

on

THE IMPACT OF THE FAIR LABOR STANDARDS ACT ON CITIES

before the

SUBCOMMITTEE ON LABOR

COMMITTEE ON LABOR AND HUMAN RESOURCES

U.S. SENATE

September 10, 1935

WARWICK LODGE NO. 7



LEO D. SLOAN MEMORIAL HOME
P.O. Box 241 Warwick, Rhode Island

Mr. Chairman and members of the Subcommittee, I am Daniel E. Silva, President of the Warwick Fraternal Order of Police Union, Lodge #7, Warwick, Rhode Island. I am submitting this letter to Mayor Francis X. Flaherty to be submitted on behalf of our Union. Mayor Flaherty is testifying on behalf of the National League of Cities regarding the impact of the Fair Labor Standards Act (FLSA) on cities and the need for immediate Congressional action.

The impact of Garcia v. San Antonio Metropolitan Transit Authority on members of our Union could be devastating. Our Union prides itself on being able to negotiate with the City of Warwick and being able to improve working conditions for its members, when necessary, and at the same time being fair to the taxpayer. Through the years of negotiations our Union has been able to settle contracts with fair and open negotiation sessions.

If the Garcia case remains intact it would only destroy years of hard work that has been put into negotiations. The members of our Union have been able to negotiate for what we feel

WARWICK LODGE NO. 7



LEO D. SLOAN MEMORIAL HOME

P.O. Box 241 Warwick, Rhode Island

fits our best interests, as well as the City's. Simply put, the contractual agreement between Warwick Lodge #7, the Fraternal Order of Police, and the City of Warwick is an amicable mixture of benefits to all parties concerned.

Members of our Union want compensatory time, bonuses and our own work schedule. We welcome Reserve Officers who give their own time when an emergency arises. It makes for a better community when volunteers, who have pride in the community they live in, are able to contribute of their own free will to their community in its time of need.

As previously stated, these matters are of importance to the City as well as its employees and should be left to our discretion and settled through negotiations at the local level. The FLSA should only apply to members of a city or town who are not covered by a collective bargaining unit or who as a unit wish to remain under the guidelines established under Garcia.

In closing, I wish to add that once again a Supreme Court

WARWICK LODGE NO. 7



LEO D. SLOAN MEMORIAL HOME

P.O. Box 241 Warwick, Rhode Island

decision has taken away from Unions as well as Municipalities the right to negotiate fairly between themselves. These negotiations lead to what I referred to earlier - an amicable mixture of benefits to all parties concerned - or better yet, a contract. We only ask that we be allowed to negotiate collectively as individuals without outside interference.

Fraternally yours,

Daniel E. Silva

DANIEL E. SILVA

PRESIDENT

WARWICK LODGE #7

FRATERNAL ORDER OF POLICE

Senator NICKLES. Mayor, thank you very much for your appearance before the committee today.

Mayor FLAHERTY. Senator, may I enter my remarks into the record, and also a supporting statement from the president of the Warwick Fraternal Order of Police, Mr. Daniel Silva?

Senator NICKLES. Certainly. We will include that as part of the record.

Our next witness is the Honorable Bill Brock, Secretary of Labor.

Mr. Secretary, we are pleased that you are here.

Senator Wallop needs to leave, but I think he wants to address a question to you before he leaves.

STATEMENT OF HON. WILLIAM E. BROCK, SECRETARY, U.S. DEPARTMENT OF LABOR, WASHINGTON, DC, ACCOMPANIED BY SUE MEISINGER, DEPUTY UNDER SECRETARY FOR EMPLOYMENT STANDARDS ADMINISTRATION

Senator WALLOP. I have to go down to another subcommittee of this committee, which has somebody from Wyoming testifying, Mr. Secretary.

Secretary BROCK. That comes first, Senator.

Senator WALLOP. You perhaps were here when I asked Mr. Reynolds the question, why should our focus in this modern era be solely on the problems created by the *Garcia* decision with regard to State and local governments.

I have been interested in this in a much broader scale for 3 years. Three years ago, I introduced a bill, and have introduced it steadily since, and *Garcia* has finally brought some attention on the whole thing.

But we have, in Wyoming, an employer who employs a lot of women, whose work cycle comes in gobs, whose employees badly wanted that job because they wanted the comp time that was offered there; many of them preferred that time with their families to overtime—though, as in the case of the mayor of Warwick and in Senator Nickles' home town, they offered both, comp time or overtime.

Why shouldn't, in a modern era, where family values are such, and people's desire for things is not always totally material, shouldn't that be an option just in the American workplace, if it is bargained for? Why shouldn't we raise our sights and take care of employers, but primarily, employees who want this kind of thing? The Fair Labor Standards Act is 50 years old, and was put in place in a totally different era, where its purpose was really to establish standards of the workweek that were and have been acceptable, in an era where workweeks were far longer, where one of the purposes was, of course, to increase employment. But in this instance, it doesn't seem as though that is what is happening, that it increases employment—especially with the slightly different standards that women have under the Fair Labor Standards Act, as opposed to male workers.

Why shouldn't we say that if employers and employees can agree on something, that that should be their right in this day and age?

Secretary BROCK. A fair question, Senator. I think you have to go back to the history of this and a lot of other laws that were written

to protect workers against the abuse that did occur at that time. There was a time—and, perhaps, still is—when some employers will abuse the economic power that they have—one of the reasons for the advent of unionism in this country, one of the reasons for the advent of the Wagner Act—and then we got some abuses on both sides.

I think what we see now—and this is the gist of your question—is a significant change in our economic matrix, the advent of women in the marketplace has really changed things very fundamentally, particularly in the sense of the family and the effect upon the family.

So I do not have any reluctance to take a look at all of these laws, rules, and regulations, in that particular context, but I think you have to be very careful about it, because there was a reason for the writing of the original legislation, and we do not want to go back to that kind of a situation.

Senator WALLOP. It would certainly not be my intent to go back to it. But I think times have changed dramatically, and I do not believe, for one, that it is impossible to amend the Fair Labor Standards Act, to give power to prevent those abuses, but also to give power to the very people who were supposed to be protected by it to construct a working environment that is to their satisfaction.

Secretary BROCK. I really cannot object to that, Senator. I think the basic point that you make is that as long as there is adequate voice, representation, and strength for the position of the workers, so that they are not abused unfairly, then I think the question is a fair one.

Senator WALLOP. Thank you.

Thank you, Mr. Chairman.

Senator NICKLES. Thank you, Senator Wallop.

Mr. Secretary, please proceed.

Secretary BROCK. Well, Mr. Chairman, if I may, I will just summarize my remarks and submit my formal testimony for the record.

Just in a very oversimplified fashion, the Supreme Court has made *Garcia* the law of the land. It has left the fate of State and local governments in the hands of the Congress. And I think, given the perhaps unintended effect of this decision, it is my belief, and I think it is the belief of this President, that congressional action is now necessary.

Garcia clearly, in a purely economic sense, is a costly decision. We tried to pin down the numbers, and it is very difficult. But we have had estimates ranging between \$1 and \$3 billion from almost all sources; I have seen almost no estimate of less than \$1 billion, and some would suggest that \$3 billion might be fairly conservative.

I think it is important to point out that the breadth of this decision really was unexpected by almost everyone—perhaps with the exception of the proponents. I am sure Mr. Reynolds has informed you that the decision runs counter to this administration's view of federalism. State and local governments, in our judgment, must be free to run their own operations without unnecessary Federal interference, and, therefore, we support your bill, S. 1570. I think it

is an excellent approach to address the major concerns that we have heard, directly, from State and local governments.

First, it would exempt State and local governments from the overtime provisions of the FLSA. They could continue comp time systems—and that seems to be one of the primary concerns that they had in expressing their feelings to us—which allows the employees to take time off for overtime hours worked.

Second, it will clearly help to eliminate the confusion about the use of volunteers. And I was interested in the previous testimony about officers serving at the Sunday morning church services, or football games, as you mentioned.

Sometimes, the government helps to defray the expenses, and S. 1570 would clarify the congressional intent to permit this practice to continue.

Finally, it would make *Garcia* prospective only. And I want to stress this point, Senator, because one of the—I am sure—unintended consequences of this decision is that there is an enormous amount of uncertainty now about the retroactive application of this decision. Nobody knows how the courts will rule on that question, but the fact that it is possible that the decision could go back for a number of years could put a burden on the State and local governments that would be absolutely intolerable. They feel that the decision itself borders on being intolerable and in some cases will be. They clearly will be faced with choices about either laying off present employees or raising taxes, or both, and that is another very considerable concern.

So for myself and for the administration, I appreciate your efforts in this regard, and those of Senator Wilson and others who have joined this effort. We support your bill, and we would be happy to do whatever we can to ensure its passage.

[The prepared statement of Secretary Brock follows:]

STATEMENT OF WILLIAM E. BROCK
SECRETARY OF LABOR
U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON LABOR OF THE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

September 10, 1985

Mr. Chairman and Members of the Subcommittee:

I appreciate your invitation to be here, today, at the continuation of the Subcommittee's hearings on Garcia v. San Antonio Metropolitan Transit Authority. As a result of the Supreme Court's decision in Garcia, the minimum wage and overtime pay provisions of the Fair Labor Standards Act (FLSA) have now been made generally applicable to employees of State and local governments.

The Garcia decision has raised major concerns that State and local governments will have increased payroll costs and reduced flexibility in workforce utilization. Officials from many of these jurisdictions--as well as organizations representing them--have contacted the Department, seeking relief from its impact, and flexibility in adjusting to it. They have also testified before this Subcommittee and the Joint Economic Committee expressing similar views.

Let me start, Mr. Chairman, by telling this Subcommittee that the Administration supports the enactment of your bill, S. 1570, and we commend you and Senator Wilson for your efforts in this area. It is a good approach to addressing the concerns expressed by State and local governments and their employees because of the problems created by the Garcia decision.

The bill would provide an exemption from the overtime pay requirements of FLSA for all employees of State and local governments and interstate agencies. The bill would also exclude from the definition of "employee" individuals who volunteer services to such agencies even though they are paid a nominal fee. The effective date of the bill would be February 19, 1985, the date of the Garcia decision.

Mr. Chairman, Garcia is now the law of the land. It says essentially that Congress has a free hand in enacting legislation under the Commerce Clause regulating activities of State and local governments. Since the Supreme Court has now ruled that this is a Congressional issue, I think it would be appropriate to briefly review the Congressional and judicial history of the application of the FLSA to State and local governments.

Limited areas of State and local government activity first became subject to FLSA in 1966. These 1966 amendments specifically extended coverage of the Act to: (1) employees engaged in the operation of schools; (2) employees engaged in the operation of hospitals and residential care facilities for the sick, the aged, and the mentally ill or defective; and (3) employees engaged in the operation of mass transit systems. This first extension of FLSA coverage to State and local governments was challenged on constitutional grounds, but upheld by the Supreme Court in the case of Maryland v. Wirtz, decided June 10, 1968.

The FLSA was next amended by the Education Amendments of 1972, which extended FLSA coverage to employees of public and private preschools.

Then in 1974, the FLSA was extended to virtually all remaining State and local government employees who had not been previously covered. However, this extension was immediately challenged, and on June 24, 1976, the Supreme Court ruled in National League of Cities v. Usery, that Maryland v. Wirtz should be overruled and that the minimum wage and overtime pay provisions of FLSA could not be constitutionally applied to the "traditional governmental functions" performed by State and local governments. To the extent, however, that a State or local government agency was engaged in "nontraditional" functions, the Court held it constitutional to apply the FLSA.

After the League of Cities decision, the Labor Department sought to list certain "nontraditional" functions. As part of that effort, the Department concluded that mass transit was "nontraditional" and thus covered by FLSA. When informed of that decision, the San Antonio Metropolitan Transit Authority brought suit to prevent its implementation. Mr. Garcia, an employee of the Transit Authority, filed suit to recover back overtime pay. The Department of Labor counterclaimed for enforcement of the Act. The Transit authority won in the District Court, but both Garcia and the Labor Department appealed directly to the Supreme Court.

The Supreme Court heard oral argument in Garcia on March 19, 1984, but instead of deciding the case, ordered reargument on whether the Tenth Amendment limitation on Congressional action under the Commerce Clause set forth in League of Cities should be reexamined. In responding to the reargument order, the Administration argued that the League of Cities distinction between "traditional" and "nontraditional" government functions should be reaffirmed, but that mass transit was a "nontraditional" governmental function and, thus, constitutionally subject to FLSA.

The Supreme Court rejected our position, and narrowly voted to overrule League of Cities. In its 5 to 4 ruling, the Court held that it was no longer constitutionally acceptable to draw a line of proper Congressional regulation of State activity under the Commerce Clause by determining whether an activity was "traditional" or "nontraditional" in nature. The decision of the majority alluded to ". . . the built-in restraints that our system provides through State participation in federal governmental action." The four dissenting justices stated that the impact of the decision would be to remove from States and localities the special constitutional protections for these governmental units which League of Cities had enunciated and leave them at the mercy of Congressional action.

Faced with the Court's decision, the Department has a clear obligation to ensure its implementation. Thus, pursuant

to the decision, the Department has adopted an investigation policy for administering FLSA with respect to State and local governmental units. This policy has five major elements. First, the Department has determined that April 15, 1985, the date the Court issued its mandate in Garcia, would be the appropriate benchmark date to be used by the Department's Wage and Hour Division in determining compliance with the Act.

Second, effective June 14, 1985--the date the investigation policy was issued--the Department's Wage and Hour Division has been authorized to conduct investigations and complaints concerning State and local governmental employment categories which, pursuant to National League of Cities, the Department had previously determined were "nontraditional", for which there was no significant litigation pending at the time of the Garcia decision.

Third, until October 15, 1985, six months after the date of the Court's mandate, the Department will not initiate any FLSA investigations of "traditional" State and local government employment categories such as fire protection and law enforcement. Investigations which disclosed violations will assess back wages to April 15, 1985. This procedure will also be applied to mass transit since its status under FLSA was uncertain until the Garcia decision.

Fourth, in order to afford a full opportunity to correct violations, the Department will not file any lawsuit against any State or local government investigated without first providing at least 30 days' written notice of our determination that it is in violation of FLSA.

Fifth, the Department's investigation policy recognizes that the FLSA authorizes employees to bring their own lawsuits to enforce their rights under section 16(b) of the Act, and this policy has no effect on these rights. If successful in such litigation, an employee may receive back pay, liquidated damages, attorney's fees and court costs. Moreover, the Department's investigation policy expressly does not apply to any pending litigation, which will be determined on a case-by-case basis.

As I mentioned, one of the most urgent requests we have received from State and local governments is to provide them with some degree of flexibility in coming into compliance with the Act. Among the recommendations they have made is for the Department to delay the application of the Garcia decision, or to phase in its application over a period of time. They have also asked us to revise the overtime hours provisions applicable to police officers and firefighters under FLSA regulations. However, we believe that the legislative history of the Act and various decisions by the courts over the years preclude the Department from providing any

general regulatory relief of this sort. In fact, we feel we must rescind our regulations defining which governmental functions were exempt from the FLSA under National League of Cities. The requirements are primarily legislative, not administrative.

Here is a short list of specific items that they have raised with us:

- o FLSA overtime pay requirements will now apply to all covered nonexempt employees, including very complex provisions applicable to police officers and fire-fighters;
- o FLSA has historically restricted the use of compensatory time off for overtime worked beyond the workweek, yet "comp time" was a widespread practice at the State and local level prior to Garcia;
- o The acceptance of unpaid services may be illegal under the FLSA. For instance, it does not appear that paid firefighters will generally be able to act as volunteer firefighters for their full-time employer during personal time outside their regular tours of duty;
- o Many State and local governments have entered into collective bargaining agreements which contain complex provisions governing pay and work schedules; many of them will not conform with the FLSA;

- o Puerto Rico has indicated that because of the generally lower level of wages prevailing in the Commonwealth, many public employees have been paid less than the federal minimum wage. Major wage increases or sharp reductions in the level of services will be necessary to comply with the FLSA; and
- o Many State and local government employees work for more than one agency of the same governmental unit. In the case of police officers, the second job may be with a private firm but in an official capacity. In either case, because questions of joint employment are raised, overtime pay may be required under the FLSA where it wasn't in the past. Some of these "second jobs"--valuable to the governmental unit and the public at large, as well as to the workers--may even disappear.

These are just a few of the many difficult (and potentially costly) problems which confront State and local jurisdictions under the Garcia decision. The FLSA does not allow the flexibility which would be necessary for the Department of Labor to be able to address these issues through the administrative process. As the FLSA has been in effect since 1938, a considerable amount of case law has developed reflecting the application of its provisions primarily to nongovernment employment. The existing and longstanding regulations and interpretations of FLSA are grounded on these decisions.

Moreover, most State and local governments operate under strict statutory or State constitutional rules which mandate balanced budgets, thus limiting their flexibility in funding the increased expenditures resulting from Garcia. These fiscal implications are a major concern for many State and local governments.

What does all this mean? First, it means that almost 83,000 units of government will be required to dramatically change their payroll practices for the 7.5 million of their employees subject to the FLSA's minimum wage requirements and for 6.7 million employees subject to its overtime pay provisions. Second, they are now subject to certain record-keeping requirements mandated by regulations under the FLSA and face significant liabilities as a result of private suits by the employees alleging underpayment of the monetary requirements of the Act.

As you know, these problems have also given rise to intense Congressional interest, as evidenced by the number of bills that have been introduced, the three days of hearings this Subcommittee has held, and the hearing conducted by the Joint Economic Committee. The bills which have been introduced to provide relief to State and local governments range from providing a complete minimum wage and overtime exemption for them to providing an overtime exemption for only police

officers and firefighters, to a bill intended to allow compensatory time off in lieu of paid overtime just for police officers and firefighters. Mr. Chairman, your bill, S. 1570, falls in the middle of this range of solutions to the problem and provides the most effective and fair relief.

We have carefully followed the hearings your Subcommittee has held on legislative proposals, noting the support for legislation that has been offered by a number of Governors, the National League of Cities, the National Conference of State Legislatures, the U.S. Conference of Mayors, the National Association of State Personnel Executives, and the National Association of Counties.

Also, as you know, Mr. Chairman, at the hearing you recently conducted in Oklahoma City, State and local government employees testified and echoed testimony from the employers that FLSA coverage will cause unnecessary hardship for employees and taxpayers; and that it will cause unnecessary reduction of services to the public.

We have also received another manifestation of employee concern about the Garcia decision. The Leon County Police Benevolent Association of the City of Tallahassee, Florida has filed suit in the U.S. District Court for the Northern District of Florida requesting that the court allow a voluntary agreement between their organization and the city through

collective bargaining which would permit employees to elect to use compensatory time off in lieu of overtime pay for overtime hours worked.

Mr. Chairman, these representatives of State and local governments and their employees have testified to the severe administrative and financial burdens the Garcia decision imposes on them. Notwithstanding the Supreme Court's latest pronouncement of the constitutionality of extending federal wage and hour requirements to integral functions of State governments, there now remains the broader question of the appropriateness of so doing in our federal system. Indeed, the Court spoke to this very issue in declaring the political process, itself, rather than the 10th Amendment, ". . . ensures that laws that unduly burden the States will not be promulgated."

Whether or not one agrees with the constitutional analysis that led to the conclusion that this consideration constitutes the only limitation on the reach of the Commerce Clause, it imposes on the federal government generally--and on the Congress, in particular--a special obligation to balance requirements for national, that is federal, responses to complex social problems against the need to respect the sovereignty of the States as States in our federal system.

The Administration believes that imposing certain provisions of the Fair Labor Standards Act on State and

local governments is an inappropriate reach of federal power into the functions of those sovereign governments. Therefore, the political process of which the Court spoke as ultimately protective of State sovereignty, and in which we anticipate today, should take corrective steps to assure that State sovereignty is not unduly infringed.

The Administration has endorsed S. 1570 because it is a good approach to resolving the concerns I have outlined for the Subcommittee.

This concludes my statement, Mr. Chairman. My colleagues and I will be happy to answer any questions that you or other members of the Subcommittee may have.

Senator NICKLES. Thank you, Mr. Secretary. I appreciate your comments and your support for the legislation. We now have 30 cosponsors, so we have grown even during the August recess which is, I think, important.

We do have, as you mentioned, a dilemma in the country until this type of legislation is passed. We have lots of counties, cities, and States who are not complying. They have in many cases entered into bargaining agreements which provided comp time. It was mentioned by the mayor of Warwick, RI, that they have comp time as part of one of their standard procedures which is popular with their employees, and they do not want to give up on comp time.

Many are not complying. You mentioned in your statement that *Garcia* is now law of the land. But we also have lots of cities, counties, and States that are not administering according to the regs or rules in *Garcia*. The potential for litigation for those that do not, and the backlog and the class action suits which we see being filed today are enormous. I think we do have a potential, would you agree, as far as a litigation disaster, pending on local governments, really, throughout the country.

Secretary BROCK. I think it could be a nightmare, I really do.

Senator NICKLES. The Supreme Court ruled they were confident Congress would take care of the States, and some of us are trying, but that is a lot easier said than done. I think their decision was that the States interests, in the Court's view, are adequately represented in Congress. I do not know, that the Court intended in the ramification of their act to abrogate agreements which were written satisfactorily to all parties concerned throughout the country; basically abrogating all those agreements that had comp time as an option. I mentioned the Tulsa, OK, Police Force. They negotiated, and offer the option of comp time or overtime. The employees have the maximum flexibility, and the city has the flexibility as far as scheduling. It has worked out to mutual advantage, and everybody is happy.

I can tell you that the members of the Tulsa Police Force are very irate over this ruling. They want this ruling to be changed; they do not want the Supreme Court coming in by a 5-to-4 decision and basically, making them rewrite their contracts.

Do you think the Court, in their decision, really understood and grappled with the implications and ramifications of this decision being so far-reaching?

Secretary BROCK. It is hard for me to characterize what the Court intended, Senator, but it does seem to me that—it is easy to believe that the States and local communities are represented in the Congress—they clearly are. The trouble with that is that, while it is easy to be represented positively, sometimes, it is tough to be represented in the sense of stopping something that is a matter of law now, because then a minority can make it very difficult, if not impossible, to change the law. And I think there is a less than full understanding of how difficult the legislative process can be sometimes in correcting the situation.

But I do think the very fact that we have that uncertainty argues for the quickest possible action by the Congress, because only the Congress now can act. We really do not have the authority in the Department to modify this decision in any effective way by

regulation. We are going to comply with the Supreme Court decision. We have no authority to do otherwise, and it clearly would be my intention to do that. If the law is going to change, it will have to be changed in the Congress.

Senator NICKLES. I understand that. The date is October 15, for——

Secretary BROCK. For enforcement action, investigative action, yes.

Senator NICKLES. If the changes are not made by October 15, then investigations could come forth from DOL as far as any complaints that might arise?

Secretary BROCK. That is correct. However, we will give the States 30 days' notice before filing any law suits.

Senator NICKLES. Take the example that the mayor of Warwick mentioned. Let's say that he has a bargaining unit, maybe 90 percent of the employees are quite happy with the comp time/overtime option. One employee is not. That employee files a complaint with the Department of Labor. What would the Department of Labor do?

Secretary BROCK. We would investigate the circumstance. If we found that comp time were being used, we would have to take action, because comp time for overtime is not allowed under the Supreme Court decision, period.

Senator NICKLES. Let me take another example. I mentioned in my opening statement, and it is very similar to one of the comments that the mayor had made, concerning a secretary working in the school system, who also supplemented her income as a busdriver. The school system said, "Well, you are not making time and a half as a busdriver, and we cannot afford to pay you time and a half." She was making \$300 a month driving the bus and is a single parent, with two children. As a secretary and also a busdriver, it works out very well in her schedule. She likes the system. But the school system said, "We cannot afford to pay time and a half for that bus-driving job," as related to her original salary, so they said, "Take your pick of which job you want to keep." She keeps the secretarial job, loses the bus-driving job, loses \$300 a month, and now she is on welfare.

The school system, when we talked to them or others, said, "Well, we have to comply with this, and under the Department of Labor's definition, she would be classified as an employee and therefore would have to be considered for time and a half for that additional job that is within the system.

Is the school interpreting that correctly?

Secretary BROCK. I think so; yes.

Senator NICKLES. I think they are, too. And again, I think this is a ramification. Even as much as I have wrestled around with labor law for the last several years, when I first read and heard of the *Garcia* decision, I did not see it being that far-reaching. But now, we find it is.

We had the mayor of Warwick who mentioned that the city police officers would work under their normal contracts, but they would also contract to do some special-type services, and at less than time and a half. Still, it was very much to their economic advantage, and evidently, it was to the city's economic advantage to

do so, and now they would be prohibited from that type of arrangement.

I would like to touch on volunteers for a minute. I know that you are interested, as I am, and Secretary Heckler and others, in trying to provide assistance for the mentally handicapped and others. We have a Foster Grandparent Program in Oklahoma, where the senior citizens go in and help the handicapped, and maybe make \$2 an hour.

Do you think that program, under the definition would be classified as an employee and subject to the minimum wage criteria?

Secretary BROCK. Yes.

Senator NICKLES. So you are talking about thousands of people across the country if you get into the Foster Grandparent Program which, again, helps senior citizens financially to some degree, but in many cases, they are offering their services as volunteers and helping. The community, city, school or whoever will have to make a decision that instead of paying a stipend or small reimbursement will end up saying, "We will pay you zero, or else we will pay you minimum wage and keep track of you as an employee." I do not think that many people have thought about how farreaching this type of enforcement will be.

Back to the enforcement. October 15 is the deadline for enforcement actions by the Department of Labor?

Secretary BROCK. That is the date on which we will begin enforcement action; that is correct.

Senator NICKLES. I know that has been published in the Congressional Record.

Secretary BROCK. We have done a lot more than that. We have sent out 83,000 notices to the myriad of cities, counties, and local units of government, State units of government. We have set out 50,000 publications, trying to explain it. We have set up a hotline so that they can call us. We have had hundreds of meetings across the country with local officials.

We are trying very hard. We have even offered to give some of our people to Governors for a period of up to 30 days, to work with them in developing the State plan to respond.

It has answered some questions; it has not answered the concerns.

Senator NICKLES. Do you have the flexibility to postpone that date?

Secretary BROCK. It is pretty difficult, Senator. We had a lot of meetings with local and State officials and told them we would try to be as accommodating as we could, but we really are bound by law and by the Court decision. I do not know what the legal ramifications would be, but I would imagine we would be subject to action if we do not pursue this particular approach.

Senator NICKLES. I am concerned about it. I know there have been a lot of notifications that have gone out in the Department of Labor, but I would also like to tell you, in discussing this with some of the people in my home State who have comp time as an option, they thought maybe it would still be OK. As I read *Garcia*, it is not an option any longer.

Secretary BROCK. That is correct.

Senator NICKLES. Would you agree with me that comp time is not an option under—

Secretary BROCK. You are absolutely correct.

Senator NICKLES. I think many people would say they want the Fair Labor Standards Act to apply to city, county, and States, under the guise of trying to help those employees. In some cases it may help those employees, but in many cases it could hurt some of those very employees that, presumably, they are trying to help. Some of the bargaining representatives have indicated to me that they thought they had the option to continue if it was mutually agreeable and whatnot. I said, "I do not see that in the ruling."

Secretary BROCK. One individual, or organization, I guess, has filed suit against us to seek the right to continue to have comp time as a part of their bargaining agreement. We have no idea how that suit will proceed. But under the present interpretation of the law and the Supreme Court decision, comp time for overtime is clearly not allowed.

Senator NICKLES. As you know, it takes two Houses to pass legislation to overturn this *Garcia* decision. We are going to try aggressively in the Senate, but still, it takes two Houses and conference and final passage, so that is easier said than done. I hope that court case will move quickly as well, because I can see a contract abrogation that is basically intact right now, whether or not all the cities and counties and States are in the process of rewriting them or not, as being one kind of a nightmare, and then the potential for liability and litigation is enormous as well.

I would like to have this thing cleared up as soon as possible. I do not think it is to the employees' advantage.

Let me give you another example of where police officers said under their seniority system, basically, the newer hires would always have to work on the weekends. So they use comp time. That is the only time they can ever get the weekend off. And this has worked with the comp time option. They said to lose the comp time option, they are going to lose a lot of police officers, et cetera.

There are many ramifications where we are basically abrogating these contracts and agreements, whether they are written or not, that are enormous, and are going to have some very negative impacts on many individuals that I do not really think the Court intended. Maybe they think Congress can respond and redress this grievance that quickly, but I am not sure it is that easily done.

Secretary BROCK. It is going to be more difficult than some assume, Senator.

I think one of the things that troubles me is that this is a clear and direct intervention in a free collective bargaining process. I am not comfortable with that, I really am not. I think individuals, bargaining unions and local management have the right to describe the terms of employment to the maximum degree of their personal satisfaction and economic benefit, and I question whether it is for us to make these decisions for them. But we really do not have the luxury of that choice, unless the Congress does act or the Court makes a different decision.

I do not really see the Court process changing that prospect very much, in all honesty. I think it really does come to the Congress. And if we begin enforcement on October 15, and there are some

who do not understand what has happened as a result of this change, and we have to take some action, if they have not communicated with their Members of Congress, perhaps they will.

Senator NICKLES. Let us say October 15 comes about, and some operation, municipality, or whatever, is still offering comp time as an option, or maybe comp time as the standard procedure for payment in overtime. There is a complaint filed and the DOL substantiates that that was the practice. What are the penalties that city is looking at?

Ms. MEISINGER. Well, if it is the Department of Labor which receives the complaint, and proceeds to investigate and finds the case as you have set out, we would assess back wages that might be due and owing to that employee, back to April 15, which is the date we are looking to as the onset of liability for our purposes.

However, if it is a result of private litigation, which is an alternative under the Fair Labor Standards Act, there is the potential for not only back wages being found due by the Court, but also liquidated damages or double damages, and attorneys' fees.

Senator NICKLES. So if a civil action were filed, you could be looking at back wages, double damages, and court costs?

Ms. MEISINGER. Yes, the Court has that discretion.

Secretary BROCK. And attorneys' fees.

Senator NICKLES. And attorneys' fees. Assuming that was on a class action basis, you could be talking about a very expensive procedure, for all involved.

Ms. MEISINGER. Yes.

Senator NICKLES. Mr. Secretary, I want to thank you for your support and also for your appearance before the committee today.

Secretary BROCK. It is nice to be with you, Mr. Chairman. Thank you.

Senator NICKLES. Thank you again.

Our next panel represents the American Public Transit Association, and includes Zoe Baird, special counsel, in Washington, DC, and also Wayne Cook, who is general manager of Metropolitan Transit of San Antonio.

Zoe Baird, we welcome you to this committee, and please proceed.

STATEMENT OF ZOE E. BAIRD, SPECIAL COUNSEL, AMERICAN PUBLIC TRANSIT ASSOCIATION, WASHINGTON, DC, AND WAYNE M. COOK, GENERAL MANAGER, VIA METROPOLITAN TRANSIT OF SAN ANTONIO, TX

Ms. BAIRD. Thank you, Mr. Chairman.

It is a pleasure to be here today. I have been asked to appear as we were counsel for the American Public Transit Association in the *Garcia* case, to describe the extraordinary responsibilities that the Court has now delineated for Congress and to address why these new circumstances should cause Congress to exempt States and local governments from the Fair Labor Standards Act.

I have submitted a longer statement, but if I may, I would like to make just a few brief remarks.

Senator NICKLES. Thank you very much.

Ms. BAIRD. As you know, *Garcia* overruled the *National League of Cities* case and held that the courts are not the proper institutions to determine whether the 10th amendment or other principles of federalism preclude Congress from applying the FLSA to State and local governments as employers.

As a threshold matter, I think it is very important to recognize that the Court did not abandon principles of federalism. On this point, I believe we diverge somewhat from the Department of Justice in our views.

To our mind, the Court decided that it is the political process of congressional action that is the appropriate forum to determine the scope of the federalism constraints on congressional action.

In so ruling, the Court for the first time vested the final authority to determine whether action in Congress will undermine the States' rights in the hands of the very entity proposing to act. This, we believe, gives Congress grave and special responsibilities that exceed Congress' usual attentiveness to legislating within the bounds of the Constitution.

I think people of all political perspectives should be able to agree that there are important reasons why we need to preserve federalism in this country. One of these reasons is that we need experimentation with ideas that are not necessarily widely held, so that the States act, as Justice Brandeis described it, as the laboratories for the Nation. This is particularly important now, and Congress has a strong interest in this regard, and in developing our Nation so that we are able to compete in an increasingly international marketplace.

The second reason that I think we can all agree that there are important federalism interests is that a dispersal of power between governments is important to protect individual rights from the unitary will of any central governmental institution. Therefore, I suggest that in deciding whether the States are entitled to an exemption, Congress should consider whether there is an important federalism interest at stake, and if so, grant the exemption unless there is some truly overriding national interest.

Even though Congress previously decided to include States and local governments in the Fair Labor Standards Act, I believe that it is appropriate for Congress to now reconsider this issue.

When the FLSA was amended in 1974 to cover all employees of State and local governments, Congress was acting within a legal framework with which you are familiar, that set out in *Maryland v. Wirtz*, where the Court had said that it is constitutional for Congress to apply the FLSA to certain State and local governmental activities, and that the Court would act to prevent the utter destruction of the State as a sovereign political entity.

But in *Garcia*, the Supreme Court has provided us with a new legal framework. It is therefore appropriate for Congress to both reassess its prior actions and to decide this issue itself.

This reassessment is all the more important because for the 10 years since *National League of Cities*, almost since the very time that Congress acted to cover State and local governments broadly, they have not been subject to the Fair Labor Standards Act. So it is appropriate that Congress, rather than simply allow the FLSA provisions to revive, reconsider whether they are now warranted.

Certainly, one of the most substantial characteristics of the States separate and individual interests is its ability to decide the wages to pay its employees and how to structure the hours that they work. Public transit agencies have faced serious problems, because there is a substantial difference between their overtime compensation philosophy and the Fair Labor Standards Act. To serve what is a primarily low-income ridership and to meet the need for additional employees during commuter rush hours, the transit agencies have paid premiums for split shifts where the employees work a total of more than 8 hours a day, but they are paid a premium for the down time in the middle of the day. This is contrary to the FLSA philosophy, which requires time and a half for hours worked over 40 per week, without any regard to special premiums paid.

As I hope that this brief summary of my testimony has indicated, the States are not seeking to deprive employees of any rights. Rather, they are seeking a leeway to structure, generally through collective bargaining systems, the particular formula for overtime compensation that is used to compensate employees for the special needs of States and local governments in providing services to their communities.

Thank you.

[The prepared statement of Ms. Baird follows:]

STATEMENT OF
ZOE E. BAIRD
O'MELVENY & MYERS
BEFORE THE
SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE
ON BEHALF OF
AMERICAN PUBLIC TRANSIT ASSOCIATION

SEPTEMBER 10, 1985
WASHINGTON, D.C.

Mr. Chairman and Members of the Committee, it is a pleasure to be here today. As we were counsel for the American Public Transit Association ("APTA") in the Supreme Court case that gives rise to these hearings, I have been asked to appear to describe the extraordinary responsibilities the Court delineated for Congress, and to address why these new circumstances should lead Congress to exempt state and local governments from the Fair Labor Standards Act ("FLSA").

I.

These hearings have been called because of the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985), which overruled National League of Cities v. Usery, 426 U.S. 833 (1976) ("National League"). Garcia held that the courts are not the proper institutions to evaluate whether the Tenth Amendment* or other constitutional doctrines of federalism preclude Congress from applying the FLSA minimum wage and overtime provisions to state and local governments as employers. The Supreme Court did not reject federalism principles; indeed, it affirmed that the Constitution requires Congress to respect the

* The Tenth Amendment states that "[t]he powers not delegated to the United States . . . are reserved to the States." U.S. Const. amend. X.

separate and independent character of state and local governments. Nevertheless, the Court concluded that the political processes of congressional action, not decisions of courts, should determine the extent to which Congress may direct state activities without violating federalism principles.

In so ruling, the Supreme Court for the first time vested the final authority to determine whether federal intervention will undermine the states' proper role in the hands of the very body asserting the right to act: Congress. This gives Congress grave and special responsibilities that exceed Congress' usual attentiveness to legislating within the bounds of the Constitution. The Supreme Court has abandoned the federal courts' historic role of mediating disputes between competing centers of governmental power. The Supreme Court has given Congress the authority to make unreviewable decisions about whether imposing a national requirement on state and local governments interferes with their separate and independent existence. Never before has the prospect existed that Congress may eliminate the core functions of another governmental sector without judicial review. For this reason, Congress now has a special responsibility to recognize the important constitutional status of state and local governments and legislate accordingly.

To recognize this special constitutional status requires viewing the states as something more than just another interest group in the political process. As the Supreme Court said in Garcia:

The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal, no matter how orthodox or unnecessary anyone else . . . deems state involvement to be. . . . What has proved problematic is not the perception that the Constitution's federal structure imposes limitations on the Commerce Clause, but rather the nature and content of those limitations. . . . [W]e continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position.

105 S. Ct. at 1015, 1016, 1020.

If the claim of state and local governments to be exempted from otherwise comprehensive national legislation is treated as simply another political claim that requires popular majority support before being adopted, the very reasons that

state and local governments have special constitutional status would be undermined. One of these reasons is to encourage local experimentation with ideas that are not necessarily widely held. This experimentation -- the possibilities that Justice Brandeis had in mind when he called the states the laboratories for the nation, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) -- is all the more necessary today as we search for new ways of competing in an increasingly international marketplace. In deciding whether the states are entitled to an exemption, therefore, Congress should determine whether an important federalism interest is at stake, and, if so, grant an exemption unless there is a truly overriding national interest.

This approach is reinforced by recognizing a second reason that the interests of state and local governments have special constitutional status: We need a dispersal of power as a check against possible incursion on individual rights by any almighty center of government. Individual liberty is protected by the division of power among the branches of the federal government and between the federal and state governments, each of which has a legitimate independent sphere of operation. This system will fail us when one of these governmental units can become so powerful that through it the majority can impose its unfettered will on the minority's constitutional status

or rights. If the Supreme Court does not do so, Congress must preserve the dispersal of power in our constitutional system.

These hearings therefore present this issue of heightened congressional responsibility: Whether application of the FLSA to state and local government employers is consistent with the constitutional role of the states in our federal system. Congress unquestionably has the plenary Commerce Clause power to regulate wage, hour and overtime compensation decisions of private employers. The issue here is whether Congress should include in such regulation state and local governments as employers. APTA believes the answer is no.

II.

Some may ask why Congress must anew question whether to include state and local governments in the FLSA since it addressed this issue in 1966 and again in 1974. The main answer is that in 1985, unlike 1966 and 1974, Congress has been told by the Supreme Court that Congress and Congress alone has the responsibility to evaluate whether its legislation interferes with the special constitutional status of the states. This new development, unprecedented in the American law of federalism, requires Congress to carry out new responsibilities.

The history of this case and the history of the FLSA demonstrate both the uniqueness and importance of the responsibility facing Congress today. FLSA regulation of state and local governments is a recent development and its impact on state sovereignty has always been controverted. The FLSA was enacted in 1938, during a period when Congress for the first time invoked its Commerce Clause powers expansively to regulate the national economy and labor conditions. The FLSA minimum wage and overtime provisions (requiring time-and-a-half after 40 hours per week) originally governed only private employers. All employees of state and local governments were exempt for the first nearly thirty years of the Act. Only as recently as 1966 was the FLSA amended to cover a limited number of public employees -- those in schools, hospitals, and the minimum wages but not overtime compensation of public transit workers.

The Supreme Court first ruled on the constitutionality of the FLSA in 1968, and held in Maryland v. Wirtz, 392 U.S. 183 (1968), that the inclusion of public schools and hospitals was constitutional. It noted that: "The [Supreme] Court has ample power to prevent . . . the 'utter destruction of the State as a sovereign political entity.'" Id. at 196. Acting on the strength of Wirtz, in 1974 Congress amended the FLSA to cover all public employees (some coverage to be phased in).

In 1976, in National League, the Supreme Court reconsidered the constitutionality of the FLSA and struck down application of the FLSA to "traditional governmental functions" of states and localities. It listed as examples of such functions police, fire, sanitation, parks and recreation, schools, hospitals -- but did not mention transit one way or the other. Justice Blackmun concurred with the majority of the Court, stating that he believed that the federal interest in application of the FLSA to the states did not outweigh the states' interest in setting their own wages and hours, but that the balance might be different with respect to other federal laws such as environmental laws.

On remand of National League to the district court, the Department of Labor announced it would not enforce the FLSA against any state or local activities until it issued a rule indicating which activities it did not believe to be traditional functions and therefore constitutionally protected from federal regulation.

Not until three years later, in 1979, did the Department of Labor announce that it intended to enforce the FLSA against certain state activities and that, in its view, public transit is not a traditional governmental function and

thus should comply. The San Antonio transit system, joined by APTA, the association representing more than 300 public transit systems in the country, sued in federal district court in San Antonio on the grounds that transit is a protected traditional function of state and local governments and it therefore would undermine the "separate and independent existence" of the states for the federal government to set public transit wages and hours. Certainly one of the most fundamental elements of a separate and independent existence is having the ability to decide what to pay ones' own employees and how to structure the hours they work.

The dispute has never been over the minimum wage requirement of the FLSA. Public transit systems pay an average of almost three times the hourly minimum wage. Federal determination of overtime compensation policy, however, has created serious problems for public transit systems. This issue has been critical to public transit managers because there is a substantial difference in overtime philosophy between the practices of these state and local agencies and the FLSA. Public transit agencies provide services to the entire community and riders pay less than half the cost for such services. Low income riders are more than eighty percent of mass transit users. Communities are served if their residents require public transportation, regardless of whether the residents of the neighborhood can

pay a significant share of the cost of the service. The elderly and disabled are given special discounts. Peak loads around school and commuter hours are substantially greater than use during other hours. To meet the need for additional employees at these times, premiums have been paid to compensate for split work shifts, that give employees time off in the middle of the day but make their total work day longer than eight hours. The FLSA developed on a private sector model. It is premised on requiring one-and-one-half times the "regular rate" of pay after forty hours, with no exclusion made for premiums paid for down time during regular hours of work. It is unclear how these two philosophies might be reconciled.

The district court in San Antonio concluded that public transit is a traditional governmental function and entitled to be exempt from congressional regulation of wages and hours. The case was directly appealed to the Supreme Court, where it was remanded for "further" consideration in light of the intervening Supreme Court decision in United Transportation Union v. Long Island Rail Road, 455 U.S. 678 (1982), a case holding that the Railway Labor Act could be applied to that commuter railroad -- which had operated under that Act for 13 years and was part of the national rail system that was comprehensively federally regulated.

On remand, state transit systems again won in the district court. On direct appeal to the Supreme Court by the

Department of Labor a second time, probable jurisdiction was noted and the parties briefed and argued the question of whether transit is a traditional function. If the Court had agreed that it is, then under National League the FLSA would not apply.

Instead of ruling, the Court set the case over to the next Term for briefing and argument on the question of "whether the principles of the Tenth Amendment as set forth in National League should be reconsidered."

Justice Blackmun, the fifth vote for National League, suggested at the oral argument that what was troubling him was how to identify a "traditional governmental function." Writing for the 5 to 4 Majority in Garcia, he rejected this test for state immunity, and the balancing test he had articulated in his concurring opinion in National League. Had the Court been able to distinguish transit from the traditional functions expressly identified in National League, it would not have had to overrule that decision to avoid applying it. Instead, the Court overruled National League, and reinstated FLSA coverage for most state employees.

It was thus only from 1968 to 1976 -- eight years in the forty-six year span of the history of the FLSA -- that

the courts suggested that inclusion of state and local governments in the FLSA was consistent with federalism principles. Unlike 1966 and 1974, Congress today can no longer assume that the judiciary will intervene if it has gone too far. Therefore Congress must evaluate for itself whether application of the FLSA to state and local governments interferes with their separate and independent existence.

III.

The Majority of the Supreme Court recognized that "the States occupy a special and specific position in our constitutional system." 105 S. Ct. at 1020. But it held that "the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself," and in the "national political process." *Id.* at 1018, 1020.

The Majority's view that structures exist -- and therefore presumably existed in 1966 and 1974 -- that ensure that the states are protected through the ordinary give and take of a majoritarian political process is profoundly wrong. Indeed, it defies our constitutional history to conclude that the states' governmental interests are protected because each state has two Senators and a certain number of representatives in Congress. It is true that the Framers originally intended

that state governments would be protected in Congress because Article I, Section 3 of the Constitution provided that the Senators were to be elected by the state legislatures. They "devised an upper Chamber designed to represent and defend that portion of sovereignty remaining in the individual States. Election of Senators by State legislatures was generally considered a natural corollary of that role." The United States Senate, 1787-1801, S. Doc. No. 64, 87th Cong., 1st Sess. 154 (1961).

But even this system never worked. "[T]his role was partially vitiated by decisions to the effect that Senators were to vote per capita rather than by States, were to be paid out of the Federal Treasury, and were to be elected for the comparatively long term of 6 years without right of recall by the legislatures." Id. Many Senators from the time of the initial Congress perceived their role as national statesmen bound to vote their own views rather than represent the interests of the state, the state legislature or the people of their state. An early example of this was the controversy created when a number of state legislatures attempted to instruct their Senators on particular votes, and the Senators refused to comply. Id. at 162-172. Many Senators took the position that they were "constitutionally bound to act in accordance 'with the general interests of the Union,'" id. at 164, and therefore could not follow the state legislature's instructions.

So unsuccessful was the attempt to have Congress directly defend the states' sovereign interests, and so unpopular did the idea that Senators were beholden to state government become, that this led to one of the relatively few amendments to the Constitution dealing with structure. In 1913, the Seventeenth Amendment did away with this system and Senators thereafter were directly elected by the people. As at that time, Congress today must evaluate the structure of our government and conclude that it cannot be assumed that the states' constitutional sovereign interests are necessarily protected in the process. Heightened congressional scrutiny is required after Garcia.

IV.

This Committee is evaluating FLSA coverage in light of the responsibility the Supreme Court has given Congress: to preserve the constitutional role of the states in our federal system when enacting national legislation. In so doing, it is not useful to consider whether Congress should exempt "traditional" but not "nontraditional" functions from FLSA coverage. The Supreme Court has found this is not a workable test for distinguishing constitutional from unconstitutional congressional action and it has no greater constitutional stature when invoked by Congress. In any event, in reaching its decision in Garcia, the Majority specifically rejected the

principal arguments advanced by the federal government and Garcia for the proposition that transit is not traditional. The Court rejected the arguments that: (1) historically transit services have not been provided by state and local governments; (2) transit's receipt of substantial federal funds makes transit nontraditional; and (3) transit is a business activity, subject to regulation when it acts as a market participant.

The dissent by Justice Powell, in which Chief Justice Burger and Justices Rehnquist and O'Connor joined, strongly stated that transit is "a classic example of the type of service traditionally provided by local government."

V.

While this legislation is pending, other problems face state and local governments after Garcia. The most significant is whether Garcia is going to be applied retroactively -- allowing suits for back wages -- or whether states must comply as of the effective date of the decision.

The Department of Labor has taken the position that it will enforce the FLSA prospectively only. Many transit systems and other state agencies nevertheless will be subject

to private suits for back wages (unless, of course, Congress acts to preclude this). Several transit cases are still pending, and other suits have been brought. For example, the North Carolina state patrol have been sued in state court there.

Fairness mandates that for several reasons the Supreme Court's decision in this case should not apply retroactively. See Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

First, the Supreme Court's decision in this case overruled clear past precedent upon which state and local governments have relied. It expressly overruled National League, a decision that had been reaffirmed in subsequent decisions by 8 of the 9 Justices, and the states did not conform their practices to the FLSA (including those set by collective bargaining agreements) in reliance on National League.

Second, retroactive application will not further, but rather may retard, the rule of the Supreme Court's new decision. Back pay awards are unnecessary to compel future compliance. See Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Instead, financial hardship to state agencies from immediate imposition of large back pay awards may cause layoffs and reduction of services, contrary to the

purposes of the FLSA to improve labor conditions. Congress did not intend to impose large liability immediately, since the original statute phased in coverage over a two-year period.

Third, retroactivity will produce substantial inequitable results to governmental entities. It would strain budgets established in light of overtime obligations set in good faith. The costs might fall on innocent third parties -- such as taxpayers and/or users of services. See, e.g., Manhart; Governing Committee v. Norris, 463 U.S. 1073 (1983). Collective bargaining agreements or other arrangements with employees have been negotiated without assumption that the FLSA applied.

In addition, there is some concern about whether there should be a grace period from enforcement of the FLSA to allow state and local governments to come into compliance. The Department of Labor has decided to allow a six-month grace period from its enforcement efforts, with an additional six months in individual cases. This is not a grace period from compliance, though, and therefore state and local governments may be subject to private suits for failure to immediately revise their practices to conform to the FLSA, even if this means paying FLSA overtime on top of other

negotiated special premiums or in addition to comparable time off ("comp time") allowed to preserve employee morale.

VI.

We recognize that all of these modifications to the applicability of the FLSA will end up treating public sector and private sector employees somewhat differently. This only reflects the basic fact that the two sectors are different and that a different type of employee is involved in each. State and local communities have to be able to devise their own ways of providing services. For example, federal requirements should not make it too costly for them to utilize split shifts of transit workers to serve rush hour commuters, or to rely on live-in or volunteer firefighters, or to keep the initial police detective on the job. When states provide comp time or other informal means of compensation they are able to provide better quality community services than their budgets allow.

Moreover, many public service activities command the devotion of an employee's time that is not necessarily a job requirement, and therefore compensable under state budgets. Public employees should be encouraged to exhibit a strong sense of community service. They certainly should not suffer substandard labor conditions, but neither should

they perceive their jobs as indistinguishable from private sector jobs. Public employees have a special mission to serve the public, and if they fail to make that distinctive commitment felt by those they serve, public dissatisfaction with the services will erode respect for the government and thereby will erode its very authority.

* * *

Thank you for the opportunity to be here today.

Senator NICKLES. Ms. Baird, thank you very much for your comments.

Wayne Cook.

Mr. Cook. Thank you very much, Mr. Chairman, for allowing us the opportunity to testify. We certainly have felt the brunt of this, being the agency that was first involved.

The impact of the decision is tremendous. We were again on the forefront of it and felt that, and I thought I could see it, and our State legislature was in session at the time. I talked to the State legislators and they said, "Yes, we see problems coming." Others, "Little problems here." We talked to our Federal representatives, "We see some problems."

I now speak to them, and they have folders this thick, with letters about the problems that the horrendous decision is costing the industry—I am talking about the transit industry, but also the Nation as a whole.

The financial impact on the transit industry has been estimated to be \$50 to \$100 million a year. That does not include revamping payroll procedures, which we are physically doing right now, at great cost, including computers, time, and staff. We are also maintaining the records required by the FLSA.

Again, I would like to stress that the minimum wage is not the problem. We pay almost three times the minimum wage, and so do most other transit companies—

Senator NICKLES. Two times or three times?

Mr. Cook. We are almost three times, and we are probably slightly below the national average on our wage. I am sure that many are three times and more.

Somehow, overtime has to be calculated. That is what the problem is. We pay overtime. We pay it basically on a daily basis. That is very common in the industry. The Fair Labor Standards Act requires that it be paid on a weekly basis. That works to no one's advantage and has cost us a great deal in trying to get the new system put in.

Just reflecting back for a minute on some of the other testimony I heard, what we have is not less overtime or employees being short-changed; it is merely a different method of calculating it. And we have spent literally hundreds of hours, trying to work up a new set of agreements or working conditions to meet the Fair Labor Standards Act. And even to this date, we are still not even sure whether these are satisfactory or not. We are talking about attorneys, we are talking about union people, we are talking about management people, working hours and hours, hundreds of hours, trying to meet the regulations. Think about what it is going to be for the thousands of cities, States, counties and other agencies.

I would like to mention that just in San Antonio alone, we have already spent over half a million dollars on legal fees; that is one transit system, not even a city, just one transit system.

Senator NICKLES. Is that just in the *Garcia* case, primarily?

Mr. Cook. The *Garcia* case and the subsequent long negotiations and discussions. We have tried to revamp our working conditions. I think Zoe did a very good job of talking about the severe blow to federalism, and so I will not repeat that. I certainly agree with it.

It does seem somewhat ironic to me that the Justice Department and the Department of Labor have pursued the *Garcia* case, arguing there is a Federal interest in the wage and hour standards of transit, while the administration argues in the budget process that there is no Federal interest in transit and that Federal assistance should be reduced by more than 70 percent. It should be one way or the other, it would seem. If one branch is interested the other one should follow suit.

The retroactive liability question we are facing, because there is a lawsuit involved—*Garcia* is still active in the district court on retroactivity—and I urge that any steps you take in your bill cover the retroactivity issue, because again, it will be terribly costly. I do not think the State and local governments can afford it. And second, it really is not fair. These employees have been paid their overtime, but calculate it under a different manner, and thus in effect retroactivity of applying the Fair Labor Standards Act on top of existing conditions means kind of, in a sense, double overtime. So there is not a fairness issue here at all.

Your bill, Senate bill 1570, would exempt State and local governments and include public fair transit systems from the Fair Labor Standards Act. We would like to see it approved. The American Public Transit Association supports your bill.

Thank you very much. If you have any questions, I would be happy to answer them.

[The prepared statement of Mr. Cook follows:]

TESTIMONY OF THE
AMERICAN PUBLIC TRANSIT ASSOCIATION
BEFORE THE
LABOR SUBCOMMITTEE
COMMITTEE ON LABOR AND HUMAN RESOURCES
UNITED STATES SENATE

SEPTEMBER 10, 1985

WASHINGTON, D. C.

Mr. Chairman and Members of the Committee, I am Wayne M. Cook, General Manager of VIA Metropolitan Transit of San Antonio, Texas. I am very pleased to appear before your Subcommittee on behalf of the American Public Transit Association ("APTA") to discuss the Supreme Court's decision of February 19, 1985 in a case in which VIA was the plaintiff--Garcia v. San Antonio Metropolitan Transit Authority. In Garcia, the Court ruled that the Fair Labor Standards Act ("FLSA") may constitutionally be applied to state and local government workers including those employed by local public transit systems.

APTA is the representative trade association for the public transit industry. We represent over 300 bus and rail transit systems across the country which carry more than 94% of transit riders in the United States. In addition, APTA's membership includes suppliers to the transit industry, state and local departments of transportation, planning agencies, and universities.

My statement on the Garcia case will not be duplicative of Ms. Baird's, which concentrated on the legal aspects and history of the litigation that resulted in the Supreme Court's decision. Instead, I plan to cover three areas: (1) the impact of the decision and the extremely difficult problems it has created for local public transit systems; (2) the

Department of Labor's initial efforts at implementing the decision; and (3) the very clear need for legislative relief from the FLSA.

Although I am here today representing APTA, I am also the General Manager of the transit system in San Antonio that initiated the Garcia litigation. Shortly after the suit was filed, APTA intervened and we have worked together closely on the litigation since that time.

IMPACT OF THE DECISION

In Garcia, the Supreme Court overruled its 1976 National League of Cities decision and swept away the constitutional immunity of state and local governments from the FLSA's wage and hour regulations. In doing this, however, the Court said there is no constitutional basis for distinguishing local public transit from other governmental functions that were expressly protected under National League of Cities such as police and fire protection, education, hospitals, and recreation to name several.

This is the only aspect of the Court's decision with which we agree--that there is no constitutional basis for distinguishing transit from other important functions of state

and local government. In all other respects, we believe the Supreme Court's decision is a disaster. As explained in this statement, the decision will have a tremendous financial impact on local public transit systems. It also strikes a severe blow to the concept of state and local government independence and autonomy, and comes at a time when units of state and local government are under pressure to shoulder an increasing financial burden.

a. Financial Impact

At this time, APTA has not undertaken a formal survey of its members to determine the full costs of compliance with the FLSA. This is because we do not have a complete set of implementation guidelines from the Department of Labor and several key implementation decisions that must be made by the Department will have a major impact on the cost of compliance.

Based on our preliminary estimates, which were developed from more detailed compliance studies at several transit systems including San Antonio, we believe the financial impact in wages alone will range from \$50-\$100 million a year on an industry-wide basis. It is important to note that this figure does not include the substantial costs of revamping payroll procedures, adding staff and computer capability to make the required FLSA calculations, and maintaining the records required by the Act.

As with other units of state and local government, the minimum wage requirement of the FLSA does not present a problem since all transit systems in the United States pay a basic hourly wage far greater than the minimum wage of \$3.35 an hour. As an example, the basic hourly wage of a bus driver for the system I manage in San Antonio is \$8.89. Based on information available to APTA, the average hourly rate of pay for a vehicle operator in public transit is almost \$9.50, with a range of just under \$5.00 to more than \$13.00 per hour.

In addition, almost all of the small number of systems that did not pay time-and-a-half for hours over 40 before Garcia was decided had agreed with their workers to pay overtime premiums on some other basis. For instance in San Antonio, we paid time-and-a-half for work on an employee's normal day off and work in addition to a driver's regularly scheduled run, which normally covers between 8 hours, and 8 hours and 45 minutes in a day. When many transit systems were private, Congress had provided for a special exemption from the FLSA due to the unusual split-shift work schedule in the industry. Labor and management worked out complex systems of premiums and allowances that both sides believed fairly compensated transit workers.

The financial impact of the FLSA comes from the unique way overtime pay must be calculated under the federal statute. Under the FLSA, transit systems are required to ignore their local collective bargaining agreements which describe the

system of premiums and allowances mentioned above, and determine the hours an employee works according to federal standards under the FLSA. This, combined with detailed regulations which redefine what has to be considered in determining an employee's "regular rate" artificially increase the number of hours credited to an employee as well as the base rate upon which overtime is calculated to a level greater than the employee's hourly rate as stated in the collective bargaining agreement. Thus, as an example, the additional pay some transit systems provide in recognition of irregular work hours and schedules that do not fit neatly into 8 hour packages may have to be added into the FLSA's regular hourly rate resulting in a windfall to workers in an overtime situation. While the differences in wages for an individual worker tend to be rather small, they add up on an industry-wide basis to the \$50-\$100 million level referred to earlier.

In this connection, it is important to note that applying the FLSA to transit does not necessarily mean that an employee will receive a bigger paycheck. The effect of the law is to encourage public employers to hire more employees with each employee working fewer hours. Thus, the paychecks of some workers will go down since, in some cases, it will be less costly to add workers or change work schedules to avoid paying overtime according to the FLSA. Of course, still another way

of responding to the FLSA in order to stay within local budgets would be to simply cut back local government services; a likely result in some instances according to the testimony provided at the July 25th hearing before this Subcommittee.

In addition to these known financial impacts, outlined above, we are now subject under the FLSA to suits by employees and the Department of Labor for back wages, liquidated damages, and attorney's fees if we make even a minor error in complying with the detailed statutory and regulatory provisions of the FLSA.

b. Impact on State and Local Governments

In addition to the significant financial impact, we believe that the Garcia case strikes a severe blow to the constitutional concept of federalism. It appears that the Supreme Court has provided a blank check for Congress to intrude unnecessarily into state and local government affairs.

We do not believe the issue of federalism is a labor issue nor do we believe it is a partisan political issue. Instead, it has to do with the exercise of restraint at the federal level and respect for the efforts state and local government officials are making in delivering services to their constituents.

Throughout the long and costly Garcia litigation, on which thousands of tax dollars have been spent, we have been at a complete loss to understand why first the Carter Administration and then the current Administration fought so hard to apply these federal wage and hour standards to local public transit systems. Quite frankly, we have yet to hear a clear and convincing argument why, as a matter of public policy, the wage and overtime pay practices of state and local governments are a matter of federal interest. Congress, we believe, has far more important tasks before it than to tell fellow public officials at the state and local level how to structure their payrolls.

In the public transit industry, we have found it particularly ironic that the Justice Department and Department of Labor have pursued the Garcia case with such resoluteness arguing there is a federal interest in the wage and hour standards of transit, while the Administration argues with equal strength in the budget process that there is no federal interest in public transit and that the federal assistance program should be reduced by more than 70%.

In fact, it should be noted that the added financial burden of the Garcia case comes at a particularly difficult time for transit since Congress is searching for ways to cut the federal deficit. The federal transit assistance program

has already been reduced by some 22% over the past five years. Therefore, we believe it is unfair to ask transit to tighten its belt further at a time when an additional cost of \$50-\$100 million is being added to our annual operating budgets as the direct result of a federal statute.

DEPARTMENT OF LABOR IMPLEMENTATION

With respect to the Department of Labor's implementation of the Garcia decision, most of the transit officials I have talked with feel that the Department has taken several positive steps, but that much more will have to be achieved in this area over the next few months. In addition, there is a growing feeling that the administrative latitude accorded the Secretary of Labor under the FLSA may not be broad enough to reduce implementation costs and burdens enough to make a significant impact.

Officials of the Department's Wage and Hour Division have been accessible to transit industry officials and have openly discussed implementation issues. We are particularly pleased that these officials have been willing to attend Association meetings to discuss the FLSA with transit managers from a wide variety of transit systems. It is clear to us, however, that these technical assistance efforts are going to need to be beefed up in the future.

Of course, the first official word we received on enforcement came on June 14, almost four months after the Supreme Court's decision, when the Department of Labor released its policy on investigations. This policy announced that the Department would not undertake FLSA compliance investigations against local public transit systems and the other functions of state and local government specifically exempt from the FLSA under the National League of Cities case until October 15, 1985. The Department went on to note, however, that the compliance period after October 15 would extend all the way back to April 15, 1985, the date on which the Supreme Court denied our motion for rehearing and the Garcia decision became final. The Department said where an FLSA suit had been filed previously, the course to be followed would be decided on a case by case basis.

We have no disagreement with the decision to create a compliance grace period and to apply the same rules to local public transit agencies as are applied to other traditional functions of state and local government. However, based on my informal discussion with other transit managers around the country, the October 15 compliance date, now just over a month away, would be very difficult for most transit systems to meet even if we

had definitive rulings on the many compliance issues presented by the FLSA. Thus, we believe there is an urgent need to extend this grace period beyond the October 15 date to permit effective compliance with the law.

In addition, the transit industry and other units of state and local government are very concerned with the question of retroactive liability under the FLSA for the period of time the National League of Cities decision was in place and the Garcia case was being litigated. While the Department's policy statement appears to address this issue from the perspective of the Department of Labor's own enforcement practice, the legal experts I have consulted say that the policy could be much stronger in this area. Specifically, we understand that retroactive application of the FLSA would not be justified in light of the legal principles concerning the prospective application of decisions by the Supreme Court establishing new rules of law.

We would urge the Department to take this position in a more forceful way to avoid the potential for litigation over back pay awards extending back into the period of time before the Supreme Court decision became final.

LEGISLATIVE RELIEF

APTA has carefully reviewed the various legislative proposals including S. 1570, which would exempt state and local government including local public transit systems from the FLSA. We agree as a matter of policy that legislation like this should be adopted as soon as possible. In this regard, we plan to work closely on this issue with the National League of Cities, U. S. Conference of Mayors, National Conference of State Legislatures, National Association of Counties, and other public interest groups who have expressed support for legislative relief from the FLSA.

Some supporters of legislative relief have noted that revisions short of a complete exemption for state and local government could overcome some of the more serious problems associated with the FLSA. For instance, some commentators have suggested that a clarifying amendment on "comp." time would solve the FLSA problem for state and local government.

This is not correct! To transit, the difficulty and cost impacts are not limited to "comp." time, but instead are the result of a fundamental clash between the FLSA's "regular rate" approach to overtime and the compensation programs that have developed in the transit industry through years and years of

collective bargaining. For this reason, we support an approach like that outlined in S. 1570, which would exempt "a State, a political subdivision of a State, or an interstate governmental agency" from the FLSA. This would provide local public transit systems the relief they need from these costly and unnecessary federal requirements and would begin to repair the damage done to the concept of federalism as a result of the Garcia decision.

* * * * *

Mr. Chairman that concludes my testimony. I appreciate the opportunity to present this statement and would be happy to answer any question you or other Subcommittee members may have.

Senator NICKLES. Mr. Cook, thank you very much.

We are very pleased to have Senator Matsunaga join us. Sparky, do you have any comments?

Senator MATSUNAGA. I have a question, if I may.

Senator NICKLES. Go right ahead.

Senator MATSUNAGA. It is to both Ms. Baird and Mr. Cook. The National Governors Association has recommended the following: One, allow State and local governments the flexibility to offer employees compensatory time off in lieu of overtime pay; two, make the provisions of the Court decision applicable to public employees on a specific future date, so that States and localities may make the fiscal, contractual, and statutory changes necessary to come into compliance; three, provide the States and localities are immune from liability incurred between the effective date of the *Garcia* decision and that specific future date, unless States or localities refuse to make a good faith effort to comply with FLSA during the interim period; and four, clarify the definition of "volunteer" so that groups such as volunteer firemen would not be brought under the provisions of the act.

Now, if these provisions were adopted, would your problem in your State or local government, whichever the case may be, be appropriately taken care of?

Mr. COOK. No, Senator, it would not. That would definitely be an improvement. But I think that total exemption is the only answer. There has been quite a bit of testimony here today about the overtime, time-and-a-half overtime. But that is only a main issue, but only one facet. And coming under these extremely complex regulations, those problems would not be solved, and it goes back to the question of federalism again. Yes, theoretically, the States and localities are represented in Congress, but certainly, we are not suited to argue our interest, as the Court said, in Congress, and I think total exemption would be the only answer, sir.

Senator MATSUNAGA. Ms. Baird?

Ms. BAIRD. I will add just very briefly, Senator, that I think there are two reasons the proposal would be wholly inadequate. The first is that the State would nevertheless be deprived of the decision to structure their wage and hours in a way that they feel is most appropriate to provide services in their communities. The second reason fits very closely within the first, and that is that States and local governments face problems other than comp time and volunteer workers.

For example, the FLSA has very onerous recordkeeping requirements. It would be very costly to States and local governments to comply with those recordkeeping requirements. Also, as we pointed out, in the transit sector, there is a wholly different problem, which is this question of the split shifts required to service schoolchildren and commuters, primarily low-income commuters, who need transit services in outlying areas that a private system just would not bother to serve.

So in our view, unfortunately, that proposal would be wholly inadequate.

Senator MATSUNAGA. Is the Metropolitan Transit of San Antonio unionized?

Mr. COOK. Yes, sir; we are.

Senator MATSUNAGA. Well, I would think that you could negotiate a satisfactory agreement through the unions if the proposals recommended by the National Governors Association were enacted, could you not?

Mr. COOK. Sir, we have been doing that with the union, and have worked up an agreement of working conditions that seem suitable or satisfactory to both of us. It is very complex, and we do not even know whether it is legal. We honestly do not know. And we have not had a ruling from the Department of Labor. I am not sure when they can rule—which also speaks back to that October 15 date which Senator Nickles mentioned. I do not think that the State and local governments can do it. I do not think it is physically possible for them to meet a date like that.

Senator MATSUNAGA. I am trying to find some solution acceptable to proponents and opponents of the chairman's proposal. Well, I yield.

Senator NICKLES. Senator, I want to thank you for your interest. I might mention to you that the Governors' association did support our legislation and endorse it.

Mr. Cook, since you are involved in the *San Antonio* decision which became very famous—infamous, cursed or whatever, depending on what viewpoint it may be, what were your practices? Instead of paying time and a half, did you pay comp time?

Mr. COOK. No. Primarily, we paid overtime in money instead of comp time. The big difference in our situation was that it was done on a daily basis, 8-hours-plus as opposed to 40 hours per week. And that is where we were really out-of-sync with what the Fair Labor Standards Act calls for. That is true in some other systems around the country, but there are also others that are something totally different.

Senator NICKLES. That was not the thrust of the *Garcia* case, was it? Mr. Garcia was not going to the Court, saying, "Hey, I want to be paid on time and a half above 40, instead of time and a half above 8."

Mr. COOK. No. That is the net effect of having the Fair Labor Standards Act applied to us; he was not going to Court asking to be paid above 40 versus 8 hours. I was just saying what did happen to us as an effect of the decision coming down the way it did.

Senator NICKLES. You are saying that the impact now, if you are under the Fair Labor Standards Act, is that you will pay time and a half above 40 instead of time and a half above 8, which used to be your practice; is that correct?

Mr. COOK. Yes, it is.

Senator NICKLES. Give me just a thumbnail sketch of the case. What was Mr. Garcia's basis for filing the suit?

Mr. COOK. I would be happy to do that, but you would get a much better answer from Zoe Baird, who has been involved in the case as counsel.

Senator NICKLES. Fine. Zoe Baird, would you care to comment?

Ms. BAIRD. First, let me remind you that this suit was brought by the San Antonio Transit System and by the American Public Transit Association, because our view was that the Fair Labor Standards Act could not be applied to transit systems at the time when

it was not applied to other activities of State and local governments.

Mr. Garcia brought a separate suit that was stayed and had not proceeded, but he did participate in ours. The primary problem is the definition of "regular rate." I mean, the Fair Labor Standards Act requires payment of time and a half after 40 hours a week, based on a regular rate of pay, and does not accommodate the special premium that the San Antonio Transit System or other transit systems might pay employees for having a split shift, so that they would get a special premium on top of their regular 8 hours' pay for a given day. And under the Fair Labor Standards Act, that special premium would be included in the base rate on which time and a half has to be paid. So that the amount of money under the Fair Labor Standards Act could be substantially greater.

Also, some systems were paying overtime after 44 hours a week, or after 42 hours a week, as opposed to 40 hours a week, and that was not allowed by the Fair Labor Standards Act.

The basic problem was that the transit systems did not have the flexibility in their collective bargaining agreements to pay special premiums and not have that count as part of the regular rate.

Senator NICKLES. The thrust of your decision was the determination of what was the regular rate, and we ended up with a court decision that basically prohibited comp time as an option, which I think Senator Matsunaga and a lot of us are hearing from our States, that individuals like comp time as an option.

Ms. BAIRD. What this points out is the absolute inflexibility of the Fair Labor Standards Act. This was developed as a private sector law and then applied to the public sector. And the reason that there are these comp time problems, or problems with volunteers or the Labor Department says that it does not have the flexibility to work some of these problems out is that the law is very rigid. And I appreciate Senator Matsunaga's search for some way to amend it that takes care of the particular public sector problem, but I think you will find that the employees in the public sector have a great deal of power in negotiating their arrangements with the State and local employers. A State cannot get away with being a substandard employer. And the collective bargaining agreements are negotiated with fairly significant strength on the part of the employees. The problem here is should the Federal Government impose these very rigid standards into the collective bargaining processes.

Senator NICKLES. Mr. Cook. What are your average labor rates?

Mr. COOK. About \$9.15, \$9.20 for an operator that has been there just a little while.

Senator NICKLES. There was no question as far as minimum wage ever even entering into it; it was just what you would determine your base rate for time and a half?

Mr. COOK. Certainly—no—minimum wage is not applicable here at all for San Antonio or any other transit system in the country that I know of. They are not even close.

Senator NICKLES. The case really did not evolve around comp time as a standard method of payment, or an option for payment for overtime?

Mr. COOK. No, sir; it did not.

Senator NICKLES. Do you have any additional questions, Senator Matsunaga?

Senator MATSUNAGA. No.

Senator NICKLES. I want to thank both of you for coming.

Thank you very much.

On our next panel are Elmer Dunaway, chairman of the National Labor Committee for the Fraternal Order of Police; Edward Blasie, president, Detectives Endowment Association, for the National Association of Police Organizations; and Michael Muth, who is legislative liaison for the National Troopers Coalition.

STATEMENT OF ELMER DUNAWAY, CHAIRMAN, NATIONAL LABOR COMMITTEE, FRATERNAL ORDER OF POLICE; AND EDWARD J. BLASIE, PRESIDENT, DETECTIVES ENDOWMENT ASSOCIATION, NEW YORK, NY, ON BEHALF OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, INC., ACCOMPANIED BY IRA LECHNER, LEGISLATIVE COUNSEL, NAPO; VINCENT McDONALD, COUNSEL, DETECTIVES ENDOWMENT ASSOCIATION; AND SGT. MICHAEL MUTH, LEGISLATIVE LIAISON, NATIONAL TROOPERS COALITION, PIKESVILLE, MD

Mr. LECHNER. Mr. Chairman, I am Ira Lechner, the legislative counsel to the National Association of Police Organizations. I would like to take this opportunity if I might to clarify particularly a misconception about comp time.

Under the current law, police officers can earn up to 11 hours each month, or 121 hours a year, of comp time. It is often bandied about—and we certainly heard it this morning—that *Garcia* outlaws comp time. That just simply is not true.

A police officer does not earn overtime under the *Garcia* decision until he works more than 171 hours in a 28-day period. And so, if he has the standard 40-hour work week, he can earn legally 11 hours of comp time every single month, which is 121 hours in a year, and that gives him plenty of flexibility in terms of the governing body.

I just saw Secretary Brock outside in the hall, and I said, "You know, there has been this misconception."

And he said, "Well, you are right. That is true, and I wish that I could have said that, or should have said that during my testimony."

So that I certainly hope, Senator Nickles and Senator Matsunaga, that the committee fully understands that police officers in Tulsa, in Hawaii, or anywhere else, are not prohibited from earning and using comp time, and they may do so up to 11 hours a month. That is not an insignificant number.

In addition, because of the scheduling that one may now engage in if you are a public employer, you can shift the work week with impunity from a 7-day work week to a 28-day work week. And so, within the 28 days, you can also average out overtime way above the 11 hours that we are talking about.

Most public employers who are aware of these provisions, and do not simply adopt the rhetoric that there is no comp time, have told me, representing the National Association of Police Organizations,

that they see no significant problem in administering the act the way it is.

Senator NICKLES. You are not listening to the same ones I am listening to.

Mr. LECHNER. Well, they may not have read that provision very carefully, because what people are thinking about is that you cannot have comp time after you work 171 hours, and they are not understanding the difference between the 160- and 171-hour standard, nor are they understanding about shifting the work week from 7 days to 28 days. Sophisticated managers are understanding that, and they find out there is not a significant problem.

Senator NICKLES. Go ahead, Mr. Dunaway.

Mr. DUNAWAY. I will deviate somewhat, if I may, Senator, from the written statement, because I have heard things I think we should get down and discuss.

Senator NICKLES. Incidentally, for all of our panelists, we will enter your entire statements into the record in full.

Mr. DUNAWAY. I appreciate that.

The Fraternal Order of Police, in existence for almost three-quarters of a century, is the oldest and largest police organization in the country, and represents approximately 200,000 police officers in excess of 40 States.

We are here to ask today, as you will see in my prepared statement, that police officers remain under the Fair Labor Standards Act, with some amendments, and one amendment basically is all that we would need, that is causing us some problems. I have met with Mr. Jim Yalin, Mr. Cordelli, and other people in the Labor Department, to discuss these problems and to find out where we stand as far as what we can operate with and cannot operate under.

Compensatory time is the problem. As the gentleman just stated, police officers can, under the 28-day work period, earn compensatory time up to 11 hours for a 28-day period, all over in excess of 171 hours; there are some restrictions that the city has to come up with some money. And I know in Cincinnati, OH, under the collective bargaining agreement that we have, the city does not agree or does not like having to pay; they like the officers to have the option, as our officers wish to have.

Most of our officers—and this has not been brought forward today at all—but I have heard that most of the officers indicate they would like to have compensatory time. There is a reason for that, and some of the statements that have been made earlier. The reason that I find, travelling over the country, is the stress that is placed on a police officer. I think most studies indicate that among occupations, police work has one of the worst records for suicide, coronary heart disease, gastrointestinal malfunctions, severe nervous conditions, neuroses, and other physical and mental disorders.

They use comp time to walk away from this job, after long hours, after a regular tour of duty. And the comment by Mr. Reynolds earlier and then his statement, that the most effective time to investigate a homicide is the 26 to 36 hours immediately after the homicide, is true. And most of these officers will work through that, and then they will take compensatory time so that they can walk away from it, get their heads clear, come back fresh, and this

confers safety to themselves and the citizens. This is the thing that is important about compensatory time that no one has hit on yet.

Instead of eliminating and taking out from under the Fair Labor Standards Act, police officers, amend that one section to allow compensatory time, because from the statements that I have heard thus far, the cities have indicated they want to grant compensatory time. We do.

We have also heard today about the collective bargaining agreements that are in existence--80 to 90 percent of the police officers throughout this country are not that privileged. They work less and are compensated less than minimum wage. They may be making \$3.35 an hour, but they are called out at all hours of the night, with no compensation whatever. If a burglary comes down, or something unusual happens, they are called at home to come out, and they are not even compensated their straight time for that. For those officers who do not have the protection of a collective bargaining agreement like some of us have the privilege of having, including the Tulsa police, let the police officers remain under the Fair Labor Standards Act. Amend it so that compensatory time can be granted in lieu of pay. From what I have heard all day today, that seems to be the solution to the problem that is facing the employees and the employer.

Thank you.

Senator NICKLES. Thank you very much for your comments.

[The prepared statement of Mr. Leshner on behalf of the Fraternal Order of Police follows:]

STATEMENT OF THE FRATERNAL ORDER OF POLICE
BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES
LABOR SUBCOMMITTEE

September 10, 1985

Elmer Dunaway
Chairman, National Labor Committee
Fraternal Order of Police

STATEMENT OF THE FRATERNAL ORDER OF POLICE
BEFORE THE COMMITTEE ON LABOR AND HUMAN RESOURCES
LABOR SUBCOMMITTEE

The Fraternal Order of Police, in existence for almost three quarters of a century, is the oldest and largest national organization exclusively representing law enforcement officers. Currently, the Fraternal Order of Police represents approximately 200,000 law enforcement officers in over forty states throughout the United States.

On February 19, 1985 the Supreme Court ruled in Garcia v. San Antonio Metropolitan Transit Authority that the provisions of the Fair Labor Standards Act were properly applicable to public employees. This decision meant that, for the first time, law enforcement officers would enjoy the same rights and privileges that other American workers have enjoyed since 1938. Specifically, law enforcement officers would be legally entitled to a minimum wage, overtime and payment for work actually performed.

It is ironic and sad that having waited so long to achieve this equity, law enforcement officers are now faced with an organized effort to eliminate these rights. This effort is all the more difficult to understand given the almost universal recognition that the job of a law enforcement officer is difficult and dangerous and that law enforcement working hours are longer and more erratic than those of the typical American worker.

The Fraternal Order of Police strongly supports the implementation of the Fair Labor Standards Act to law

enforcement officers and opposes any blanket attempt to exclude law enforcement officers from the coverage of the Act.

The Fraternal Order of Police does favor one modification to the Fair Labor Standards Act based on the unique characteristics of the law enforcement job. Police work is one of the highest stress occupations in this country. Countless articles have been written in recent years documenting the effect of stress on police officers. These studies indicate that, among occupations, police work has one of the worst records for suicide, coronary heart disease, gastro-intestinal malfunctions, severe nervous conditions, neuroses and a number of other physical and mental disorders. The divorce rate among police officers is one of the highest in the country. These studies also document that the effects of many of the "stressors" are cumulative in nature.

Police Departments have sought to deal with the stress problems in a variety of ways. One of the most important ways that Departments have dealt with the problem has been by allowing police officers to take compensatory time off from the job. Specifically, where a police officer has worked long and arduous hours in excess of a standard week, (for example, working consecutive days for long periods, back to back shifts, call backs, extra duty), many Departments have given the police officer the choice of taking overtime in cash or in time off. Many officers have chosen by necessity, to take compensatory time off. The ability to take such compensatory time off is absolutely essential for a police officer to be able to perform

his or her job effectively over an extended period of time. Without the ability to take such time off, the police officer is himself endangered and the public health and safety is needlessly placed at risk.

Because of the unique characteristics of the law enforcement profession, and because of the potential risk to the police officer and to the public health and safety, we are proposing that the Act be modified to permit the existence of compensation systems which give law enforcement officers the choice of taking required overtime in the form of cash or "comp time" (at the appropriate overtime rate).

The Fraternal Order of Police strongly urges that this limited exception to the overtime provisions of the FLSA be provided for law enforcement officers.

Senator NICKLES. Mr. Blasie?

Mr. BLASIE. Good morning, Mr. Chairman, members of the subcommittee. My name is Edward J. Blasie, and I am testifying on behalf of the National Association of Police Organizations, known as NAPO.

NAPO is a membership organization of the rank-and-file police officers across the country, with over 60,000 members. Our sole function is to represent the interests of law enforcement officers before Congress.

I am president of the Detectives Endowment Association of the police department of the city of New York, and I represent over 3,000 New York City detectives.

The *Garcia* case, in our view, does not occasion substantial remedial legislation. In 1976, the Congress overwhelmingly voted that employees of State and local governments should be covered by the Fair Labor Standards Act. There is simply no reason to reverse that judgment. The Supreme Court decision does not change any of the fundamental reasons why the Congress extended the FLSA's coverage to public employees.

Why single out municipal and county employees to be the only ones in the entire country who should not receive overtime pay when they work overtime?

Such a distinction particularly makes no sense in the case of police officers and fire protection employees who are often risking their lives while working overtime in the interest of all the other citizens in the public who are entitled to get paid overtime and do so by law.

Inasmuch as the Federal Government was not affected either by the original *National League of Cities* decision or the decision of the *Garcia* case, it has been living with and paying under the Fair Labor Standards Act for its employees since 1974 without interruption and with no problems. Should local government employees now be treated differently from Federal employees when they each work overtime performing parallel work?

The basic fairness of the application of the Fair Labor Standards Act to public employees when all other employees in the country are covered is so clear that we are confident that this subcommittee and the Congress as a whole would not want to reject or modify that concept. In other words, "If it ain't broke, don't fix it."

The concern of some is that public employers are different from private employers, that FLSA wages are budget busters, and that public employers adopt their budgets on a yearly cycle. Therefore, as the argument goes, public employers need more time to adjust to the *Garcia* decision and its effects must be postponed, or eliminated altogether.

This argument is simply without merit. NAPO has done a careful examination of the potential effect of FLSA coverage on public employees and finds that overall, the vast majority of public employees are not scheduled to work any overtime. While most cities and very large counties have professional firefighters who normally are scheduled to work 3 hours overtime a week, the total extra cost to the employer under the FLSA would be minimal, usually averaging only about 3 percent of only that portion of its budget allotted to the firefighter salaries.

And public employers may, under current law, make certain scheduling changes which minimize that small cost, or even eliminate overtime costs altogether. The impact of the FLSA on most police officers is extremely limited as well, because police officers normally are not scheduled to work overtime and usually do so only when there is an emergency situation.

This is what it comes down to: The FLSA really does not affect public employees except in the limited circumstances where there is an emergency and they have to work overtime instead of returning home to their families. Shouldn't they receive overtime compensation at those times, often risking their lives performing police and fire protection work? And clearly, there are enough contingency funds in every public employer's budget to accommodate those special emergency situations. The cries of the National League of Cities that FLSA coverage will bankrupt the cities is outrageous.

There is one other situation which the subcommittee is considering about which I am compelled to comment. Under the FLSA, compensatory time cannot be used to offset earned overtime except if it is earned and taken within the same work period. Comp time is preferred by both employees and employers, because it does not involve cash and is like a barter system which permits employees to work long hours one week and take an extended vacation 6 months later, instead of a cash payment for overtime.

But there is a big problem with new legislation which would install a system exclusively of comp time instead of cash for working overtime. New York City has a system in which the first 100 hours can be taken in cash or comp time, but after that, it must be comp time except for investigations.

I have detectives who now have over 300 hours of comp time on the books, but who can never take that time because the department is seriously undermanned. Since 1974, the caseload for criminal investigations has quadrupled, but our work force has been diminished from 3,500 detectives to 3,000 men and women. A system of only comp time is subject to a great deal of abuse; it is a simple matter for higher authorities to pass the word that promotions will not be forthcoming for those who demand their comp time.

Let us leave the law the way it is. Under the current Fair Labor Standards Act, an officer can earn up to 11 hours of comp time for working overtime in a month and be paid in cash for additional overtime in extraordinary circumstances. This is a fair and equitable system and should not be changed.

Thank you very much for the opportunity to present NAPO's views on this subject. I would consider it a privilege to answer any of your questions.

Senator NICKLES. Thank you very much.

Sergeant Muth.

Sergeant MUTH. Mr. Chairman, I am Michael Muth, speaking for Trooper Thomas Iskrzycki, chairman of the National Troopers Coalition. The National Troopers Coalition represents close to 40,000 State troopers from State police and highway patrol agencies throughout the United States.

The National Troopers Coalition is emphatic in its support for the provisions of the Fair Labor Standards Act as it applies to law enforcement officers. For too long, our dedicated officers have been

asked to sacrifice their time in excess of normal work hours demanded by employers without adequate compensation. Employers have sought rigorous schedule adjustments to meet manpower requirements without promise of additional compensation, or with false promises of compensatory time to be granted at a later date. Had management and government applied common sense and the dictates of the FLSA, we would not now hear the hue and cry of the specter of financial burden that has yet to materialize on those organizations and governments that are forced to comply with basic working conditions imposed by the FLSA.

Let us clear up one basic myth that has been discussed by proponents of legislation to exempt public service employees and our dedicated troopers from the FLSA. The *Garcia* decision does not mandate overtime payment. It does warrant government to comply with basic working conditions that should be a right enjoyed by all levels of government employees.

What local or State government has declared bankruptcy over this decision? No one.

Has it caused those organizations and governments to be realistic in their approaches to providing decent working conditions and personnel policies for their employees? Yes.

After a long period of benign neglect toward personnel policies, government is now forced to recognize basic working rights and in effect provide a positive incentive to insure that the citizens of our great country receive the efficient services that they demand.

How long have we heard the complaint from State and local government that many of their employees are leaving government services for the private sector due to a prospective increase in salary, overtime benefits, and employer-provided policies that far outweigh the benefits provided to government employees?

The cost to hire, train and gain the level of experience desired far outweigh any negative impact being testified here before you today.

Law enforcement officers have historically been a priority concern of the citizens in their fight to combat the rising crime rate and provide a secure community in which to raise their families. Are we to assume that by excluding our dedicated officers from the Fair Labor Standards Act that the already thin blue line that separates the criminal element from gaining the upper hand will be strengthened? I think not.

Numerous studies that are a matter of public record already show the divorce rate, suicide rate, reduced lifespan, increased stress and hypertension to be among the highest in the Nation with regard to law enforcement officers. Our already stretched resources are at the breaking point. By now having to adhere to realistic working conditions, we could only hope to see a reversal in the health-related concerns of our members. To negate this hope through pending legislation is to issue a mandate to government officials to return to past acts of servitude that only exacerbates an already critical situation, with regard for the health and well-being of our dedicated law enforcement personnel.

Previous testimony has raised the question on additional hiring to offset overtime payment. I can assure you, Mr. Chairman, that these same officials have not heard their constituents' plea for ad-

ditional law enforcement officers and their willingness to provide additional funding for such purposes. The recent court decision may very well provide the avenue for government officials to comply with the public demands that have been historically asked for and ignored in the past.

In summation, Mr. Chairman, we would ask that this committee give serious consideration to our concerns and legislate what is fair to our law enforcement personnel.

Thank you.

The only other comment I might add, Mr. Chairman, is what the previous testimony here at this table has indicated. The prior testimony you have heard here this morning has basically dealt with contract States and contract organizations, and it has been brought out that 80 or 90 percent do not fall under contract. And the Fair Labor Standards Act and the *Garcia* decision has been a long time coming and is very welcome by the rank and file in the law enforcement community.

The only other concern that I have had that has been brought to my attention is in the area of training. I know some testimony has been received that certain States and police departments and organizations require more than an 8-hour day in terms of training academy living and so forth, and one of the considerations that the committee might consider is to possibly, along with the compensatory time, address the issue of the excess hours needed for training, to exempt that from the Fair Labor Standards Act.

Senator NICKLES. I certainly appreciate all of your comments; especially your comments, Mr. Dunaway, basically indicating some flexibility in trying to work out the comp time.

Mr. Lechner, you indicated there is comp time provisions if taken with 28 days and up to 11 hours. I have a petition here, signed by the Fraternal Order of Police in Tulsa, OK, that says they do not think that is enough. Mr. Blasie, you mentioned something that they mentioned in their statement—"If it ain't broke, don't fix it." They are quite happy with the options they now have, which maximize the options for the employees. They can take overtime or they can take comp time at their option, not limited to 11 hours, not limited to a 28-day cycle. They do not work on a 28-day cycle. As a matter of fact, I would be surprised if many did. I expect that it varies, probably, from city to community to county, and there are probably various different options.

I become more impressed with the more I learn. I did not know much about your field until I got into this, and the variety of methods that the sheriffs and the county officers and police officers have used in scheduling is unlimited. I understand you have a difficult operation. You have to be there on weekends. You do not work 40-hour weeks. You have to be busy on Memorial Day and Labor Day and days that normally, the 8-to-5 people have off. Those are your busy days, those weekends and so on, and nights, and on-call, and so on.

I am impressed with the ingenuity of groups to come up with flexible schedules and types of things that, again, a lot of our people, some that are in bargaining units and some that are not, seem to be quite happy with. Many involve combinations of comp time and overtime who made the comment, "If it ain't broke, don't

fix it," and "why is the Supreme Court coming in and mandating that we cannot do this."

Granted, there is some flexibility. If you are on a 28-day cycle, you have up to 11 hours. But for a lot of groups, that is not adequate flexibility, and so they are concerned with it.

We hope to come up with something which will provide that flexibility and give an advantage to the employees and the cities working together, not in a frictional type way, but in a positive situation, to where it is to their advantage. It is not to the city's advantage to come up with a system that the employees are not going to be happy with, and basically end up leaving and finding some other type of work, with high turnover and training expenses, and so on. I appreciate Senator Matsunaga's comment of willingness to try and see if we cannot work out something that would be mutually advantageous to everyone concerned.

Senator Matsunaga, do you have a comment or a question?

Senator MATSUNAGA. I believe Mr. Blasie had an additional comment.

Mr. BLASIE. Senator, if I may explain why the *Garcia* law is so important to us in New York City, particularly the detectives.

The abuses that have been done to the NYPD detectives by management is illustrated by a classic example which happened fairly recently. We had a major hotel strike in June of this year. Being aware of the *Garcia* law being signed on February 19, 1985, New York City still refused to pay my detectives cash overtime. Subsequently, in order to avoid paying out cash overtime, they would put more detectives out on detail in hotels, and take them off major homicides, major robberies, major rapes, and put them in hotels where management, instead, could have put police officers. But all police officers at NYPD must be paid overtime in cash, or they have the option of taking comp time. My people do not have that option and management took them off of major felony cases that they were investigating in order to avoid paying overtime.

This is just one of the abuses that we put up with.

Senator NICKLES. That may be good justification for need to overturn this decision. We have almost the identical thing in Washington, DC, where we had a homicide and had three different sets of detectives working on the same homicide and taken off because the city said they cannot afford to pay overtime.

Mr. DUNAWAY. That, Senator, is why you need the amendment to allow comp time. And most of these officers that would work overtime, as I indicated earlier, would welcome getting 8 hours off or 12 hours off, to get the hell away from it for a while.

Senator NICKLES. I know the officers are very dedicated, and if they are involved in a homicide investigation, they do not want to get off after 8 hours.

Mr. DUNAWAY. And they are not looking to break the city by saying, "You are going to pay me cash today," when the city is saying, "I do not have the money to pay you." They are saying, "Give me comp time. I will use it somewhere down the line."

There is no outlay of additional money when you grant comp time. That is a benefit to the city. You will lose a day's production, the day's work that he will not show up because he is taking 8

hours off, but as far as laying out additional cash, the city's budget is not messed with.

Mr. BLASIE. We just finalized 14 months of negotiation. The only aspect outstanding is this 100-hour cap. The city of New York wants the union to pay for the overtime that my detectives generate over the 100 hours; they want us to pay for it. The initial cost factor index that they costed out was \$475,000. On a second study, it was reduced to \$375,000. When we went over and checked every card that they were referring to, causing that factor, it was reduced to \$150,000, the final figure. With 3,000 detectives, that would cost the city of New York \$50 per detective to lift the cap and pay them for cash overtime. With a \$5 billion budget, that is not going to bust the city of New York.

Senator NICKLES. Senator Matsunaga.

Senator MATSUNAGA. Thank you, Mr. Chairman.

Mr. Dunaway, in your statement you said that you oppose any blanket attempt to exclude law enforcement officers from the coverage of the act. Then you propose an amendment, if you will, which would allow police officers to take compensatory time off from the job. It was stated earlier here, and also by Mr. Blasie, that the FLSA presently permits 11-hours compensatory time off for every 171 hours. Are you saying that that 11-hours of compensatory time off is insufficient for police officers?

Mr. DUNAWAY. Yes, sir, it is. In some areas, it is insufficient. There should be no maximum, and it should be up to the officer earning the overtime whether he takes pay or money. In negotiations, we have discussed this for many, many years.

If the officer's overtime or compensatory time bank is down somewhat, and he works overtime, there is a great possibility that he will increase it for emergencies that will arise and, as I indicated, to get the heck away from the job occasionally.

If he has a large amount on the books, then most of the time, he will take the money, which the city can afford to pay, and this is the position. It gives the flexibility to the officer to be able to walk away when he needs to, to be fresh and furnish protection to our citizens. It also allows the city to save that money and not have to pay it out at the time and invest it and earn interest. It is in everyone's best interest, with no maximum on that, yes, sir.

Senator MATSUNAGA. Is there any member of the Fraternal Order of Police who makes less than minimum wages?

Mr. DUNAWAY. There are members in Manchester, OH, when the minimum wage was \$3.35, and I am not sure what it is now, if it is still that, or \$3.50.

I was sent up there to talk to those people, at their request. They were earning \$3.35 an hour for an 8-hour day, but then they were called out at all hours of the night. If a burglar alarm went off, they would receive a phone call at home, and they would spend 3 or 4 hours out on the street, investigating that, with no additional pay.

Senator MATSUNAGA. They were making less than the minimum wage as prescribed by—

Mr. DUNAWAY. In a 24-hour day, yes, sir. For the 8 hours that they are on duty, they would make minimum wage, but there was

no compensation for them whatsoever when they were called out at night.

Senator MATSUNAGA. In excess of 8 hours per day?

Mr. DUNAWAY. Right.

Senator MATSUNAGA. Thank you. So that, in fact, they were being paid less than minimum wage.

Mr. DUNAWAY. In a 24-hour day, yes, sir.

Senator MATSUNAGA. Now, of course, as a former assistant public prosecutor in the city and county of Honolulu, I have some understanding of the work that police officers do, and detectives, too, of course. I worked with them for a period of 2 years, and I understand the stress and strain and the need for overtime.

You probably heard earlier the proposal of the National Governors' Association. One of the provisions is that by collective bargaining or otherwise, at the option of the employee, he either be allowed to take compensatory time off, or cash, whichever. Now, would that be a satisfactory provision, as you suggest it?

Mr. DUNAWAY. That is the position of the Fraternal Order of Police on the national level, and we have a resolution that was adopted last month in Baltimore. That is agreeable to us, and we think it is the only workable solution.

Senator MATSUNAGA. What about the detectives, Mr. Blasie?

Mr. BLASIE. Senator, if we knew that we were protected by the law, I may be able to live with that concept—as long as I can be assured that if my people do elect to be paid cash that they are paid cash. But my problem with it is that in previous experiences, they have been coerced and threatened, not promoted in rank, or assignments——

Senator MATSUNAGA. Don't you have collective bargaining?

Mr. BLASIE. Yes, sir.

Senator MATSUNAGA. You do.

Mr. BLASIE. Yes, sir.

Senator MATSUNAGA. Well, you have by collective bargaining at this point, arranged satisfactorily with your employer as to compensatory time off, overtime pay?

Mr. BLASIE. Yes, sir, we have. But in order to alleviate paying for overtime above 100 hours, which is in our contract now, they want the union to pay for my membership's overtime that they perform for the city of New York—which is not fair.

Senator MATSUNAGA. Well, of course, if the law provides that you may either have compensatory time off or cash overtime pay, whichever the case may be, wouldn't that make it easier for you in collective bargaining with your employer?

Mr. BLASIE. Yes, sir. If I had that by law, I could live with that.

Senator Matsunaga. And what about the troopers?

Sergeant MUTH. Well, the problem there, Senator, is most of the States are noncontract States. And you run into the problem where we have had instances of troopers banking 500, 600, 700 hours of compensatory time and not being allowed to take it. So in essence, that man has worked 700 hours for nothing.

Now this is forcing management to be a little bit realistic in their approach to working hours, and in some States like Missouri, they have backed the hours back down to 171, and the men like it. The comp time is no good if you cannot use it.

Senator MATSUNAGA. You don't have the benefits of collective bargaining?

Sergeant MUTH. No, sir.

Senator MATSUNAGA. None at all?

Sergeant MUTH. Not at all.

Mr. LECHNER. Senator, probably 90 percent of police officers nationwide do not have collective bargaining.

Senator MATSUNAGA. Oh, really?

Mr. LECHNER. In many States, it is prohibited. In most of the South, you cannot have collective bargaining at all. And public employees such as police officers or troopers or local government employees who are public employees and fire fighters have no collective bargaining.

The answer to the problems that have been raised—whether 11 hours of comp time is sufficient—unfortunately is not the approach, if we may be so bold to suggest, of Senator Nickles' bill which removes public employees completely from the coverage of the act. Don't simply eliminate the entire Fair Labor Standards Act protection for all of those many thousands of public employees who are not covered by collective bargaining and leave them to the mercy of being forced to work overtime with no protection whatsoever. That is not the answer.

I think all police groups are uniform in agreeing with that, and I am sure that the Tulsa police officers are as uniform in that as we are, and that is—don't leave their brother officers all over this country without any protection whatsoever.

Senator MATSUNAGA. Well, I have a beloved son-in-law who is a police officer, and if I am prejudiced, you know where my prejudice lies. But I am amazed to find that so many of you are not protected under collective bargaining.

Mr. LECHNER. Only the major cities, Senator, have collective bargaining like that. Most rural areas have no collective bargaining whatsoever, and in most southern States, like Virginia, for example, there is no collective bargaining in the State. It is prohibited.

Senator MATSUNAGA. No further questions.

Mr. McDONALD. Senator—

Senator MATSUNAGA. Yes?

Mr. McDONALD. If I may, my name is Vincent McDonald, and I am the attorney for the Detectives Endowment Association in New York, and I have a small amount of experience in collective bargaining, and I have been listening to this all morning long.

For 15 years, I served three Governors in the State of New York and three mayors in the city of New York. I have served the mayor of the City of New York in the Office of Collective Bargaining, as his representative, dealing with some 300,000 city employees. I have served three Governors as the chairman of the State Labor Mediation Board. I am the arbitrator in the sanitation strike in New York in 1968. I have been involved in every major negotiation in New York.

And I have sat here with great interest. And I thought that I was involved in many employer negotiations over the years, in listening to the employer representatives this morning—the statements that the union members like this, we all like it.

What you have said, Senator, is right. If there is a choice where the employees can determine whether he takes comp time or overtime, that would be satisfactory. The problem here is what you have heard. In the city of New York—which is certainly not behind the eightball in bargaining abilities—over all of these years, detectives in the city of New York do not have the right to make that election. Up to 100 hours, they can. Beyond 100 hours, they cannot.

And what is the cost of this? We just costed it out, as Detective Blasie has indicated to you, at an average of \$50 a man. Do we think that will bankrupt the city of New York, with a couple of billion dollar budget? It is just too ridiculous to think about.

Thank you.

Senator NICKLES. To all of our panel, we appreciate your comments today.

Thank you very much.

Our final panel includes William Summers, supervising attorney, representing the International Association of Chiefs of Police; Commissioner James Roberts, representing the Mississippi Department of Public Safety; John Stewart, Chief of the Hartford Fire Department, representing the International Association of Fire Chiefs, and Roy Saunders, president-elect of the International Association of Auditorium Managers.

Mr. Summers, would you care to be first?

STATEMENT OF WILLIAM C. SUMMERS, SUPERVISING ATTORNEY, INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., GAITHERSBURG, MD; JOHN B. STEWART, JR., CHIEF, HARTFORD FIRE DEPARTMENT, HARTFORD, CT, ON BEHALF OF INTERNATIONAL ASSOCIATION OF FIRE CHIEFS, ACCOMPANIED BY FRAN MILLER, DISTRICT CHIEF, CHESTERFIELD COUNTY FIRE DEPARTMENT, CHESTERFIELD COUNTY, VA; JAMES L. ROBERTS, JR., COMMISSIONER, MISSISSIPPI DEPARTMENT OF PUBLIC SAFETY, JACKSON, MS, AND ROY G. SAUNDERS, PRESIDENT-ELECT, INTERNATIONAL ASSOCIATION OF AUDITORIUM MANAGERS, TULSA, OK

Mr. SUMMERS. Thank you, Mr. Chairman, and members of the subcommittee. I am William Summers, supervising attorney for the International Association of Chiefs of Police. I would like to thank you for promptly responding to the cries of distress from those affected by the Supreme Court's ruling in *Garcia vs. San Antonio Metropolitan Transit Authority*, by holding these hearings and the other hearings that you have held.

In the interest of time, I will submit my statement for the record.

Senator NICKLES. Thank you

Mr. SUMMERS. The IACP is a voluntary professional organization, established in 1893. It is comprised of chiefs of police and other law enforcement personnel from all sections of the United States and 76 nations. Command personnel within the United States constitute more than 75 percent of the association's membership. IACP members lead and manage more than 480,000 law enforcement officers, as well as thousands of civilian employees at the Federal, State, and local levels.

We believe that the welfare of the United States has been put in jeopardy by the imposition of the inflexible requirements of the Fair Labor Standards Act on State, county, and municipal employers.

During these hearings, which began on July 25, you have heard testimony from many representatives of States, counties, and municipalities regarding their inability to maintain current levels of service while complying with the FLSA. As many of these people have emphasized, among the areas that will be hardest hit is law enforcement.

I would like to elaborate some of our concerns at this time.

Law enforcement agencies have the responsibility of providing the public with protection on a 24-hour basis. The only way law enforcement administrators have been able to do this is through flexibility in scheduling for both sworn individuals as well as civilian. The FLSA has attempted to take into consideration the unique nature of law enforcement in section 207(k). This section allows law enforcement agencies to require officers to work 171 hours over a 28-day period. Although this gives agencies some flexibility, it is not enough. Civilians are not included in this provision.

Most dispatchers throughout the country are civilians, and therefore, as civilians, they must be paid overtime for anything over 40 hours. In order for an agency to properly provide dispatch service that is required, the dispatchers must be on the same duty stations at the same time as the officers.

You referred earlier to the case in Washington, DC, so I will not go into that. However, the integrity or efficiency of investigations may be compromised throughout the country if they must be turned over from officer to officer as the shifts change. Certainly, agencies will not allow this to happen if it can be avoided, but when money runs out, they will have no choice. The alternative that they have had to grant comp time for hours worked beyond the normal tour of duty has been satisfactory in most cases. Many officers prefer the comp time and are not happy about the prospect of working overtime without comp time. In fact, therein lies the complications that many agencies are going to reach in complying with the FLSA as it currently stands.

As we have discussed earlier, many contracts are in effect that have negotiated comp time as opposed to time and a half, cash payment. I think all these contracts will have to be renegotiated.

The public loses out, as well. Comp time has been an essential portion and part of the educational incentive program. If officers are only given their annual leave of 2 weeks or 3 weeks a year, they would most likely spend this time to relax with their family. If they have accumulated comp time, they are often willing to spend much of this time on nonmandatory training programs, possibly special weapons and tactics training or attend college.

Another major issue and effect of the overtime provisions of the FLSA will be the effects on recruit training in many agencies. The efficiency and effectiveness of any law enforcement agency is directly related to the training received by its personnel. Typically, uniform personnel are required to successfully complete an extensive course of academic and physical instruction prior to assuming their duties. This cannot be accomplished in a 40-hour week.

California Highway Patrol recruits are required to work 53 hours during a 20-week training session. The Arizona Department of Public Safety requires law enforcement recruits to put in 54 hours a week. In Payette, ID, police recruits train 60 hours a week.

There are many agencies that follow similar schedules in order to put well-trained officers on duty as quickly as possible. If these agencies are forced to pay overtime for trainees, they will have to consider several alternatives, none of which are acceptable. One alternative would be to cut back on the number of training hours by reducing the curriculum: However, this will result in the graduation of employees that are less prepared to assume the law enforcement duties. This will affect both the officers' safety and the public's safety.

Another alternative is to cut back on the numbers of hours of training per week, but extend the number of weeks of training. The information provided to us by many agencies that will be doing this makes it clear that this is very costly. In changing from a 16-week training program to a 23-week training program, the Michigan State Police estimates an additional cost of \$64,000 in meals, lodging, mileage, and a small amount of overtime. Increasing the length of training period will keep employees in a nonproductive status for a longer period and could be expected to increase the dropout rate, further increasing the cost per graduate. It might also act as a recruitment barrier, particularly for the better-qualified candidates.

Finally, agencies could pay the overtime. Given the reality that unlimited funds will not be given to law enforcement agencies for paying overtime, this would mean taking thousands of dollars away from enforcement activities for nonproductive recruit overtime.

The California Highway Patrol estimates that continuing its current program and paying overtime will result in approximately a 49-percent increase in the cadet salary because of overtime, and place it close to the top step of the State traffic sergeant salary range. Upon graduation from the academy and assignment as a State traffic officer, each cadet would experience about a 33-percent cut in pay.

Compounding the problem of recruit training is the fact that in many cases recruits are not sworn prior to graduation from the recruit training. That is, they are not given the power to enforce laws and make arrests until after the completion of their training.

In a survey conducted by the IACP, we found that the overwhelming majority of State police agencies and about half of the municipal agencies that responded follow this practice. What this means is that these employees do not come within the exemption of section 207(k) while they are in training therefore requiring that anything over 40 hours be paid in time and a half.

Senator NICKLES. Mr. Summers, if I could interrupt you, we have three or four more panelists, and I know Senator Matsunaga and myself both have some time constraints. Could you summarize, or let me come back to you in the form of a question?

Mr. SUMMERS. I will. One of the other problems we have seen is in take-home car programs. Does the FLSA require those officers that have take-home cars to use the time in commuting as part of

their regularly scheduled time? If they stop in an emergency situation, will they have to be compensated?

The other thing that was brought up earlier by one of the other speakers is special programs. We have heard of one county that their officers volunteer to go to a camp during the summer, for 1 week; they are relieved of all other duties during that period of time, and they are paid their normal salaries. Now, for the hours that they are required to be at this camp in addition to the 8 hours a day, will they have to be paid time and a half for that type of program?

Senator NICKLES. Good question. Thank you very much.

[The prepared statement of Mr. Summers follows:].

STATEMENT
of the
INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE
before the
SUBCOMMITTEE ON LABOR
of the
UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES
regarding
THE APPLICATION OF THE FAIR LABOR STANDARDS ACT
TO STATE AND LOCAL LAW ENFORCEMENT AGENCIES
September 10, 1985

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE, I AM WILLIAM SUMMERS SUPERVISING ATTORNEY OF THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE. I WOULD LIKE TO THANK YOU FOR PROMPTLY RESPONDING TO THE CRIES OF DISTRESS FROM THOSE AFFECTED BY THE SUPREME COURT'S RULING IN GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY BY HOLDING THESE HEARINGS TO ASSESS THE DECISION'S IMPACT. AS YOU KNOW, IN GARCIA THE COURT OVERRULED NATIONAL LEAGUE OF CITIES v. USERY, THEREBY REMOVING ITS BARRIER TO THE APPLICATION OF THE FAIR LABOR STANDARDS ACT TO STATE, COUNTY AND LOCAL GOVERNMENT EMPLOYERS. I AM HERE TODAY TO TESTIFY ON BEHALF OF THE 13,000 MEMBERS OF THE IACP REGARDING THE RAMIFICATIONS OF THIS DECISION ON LAW ENFORCEMENT AGENCIES.

THE IACP IS A VOLUNTARY PROFESSIONAL ORGANIZATION ESTABLISHED IN 1893. IT IS COMPRISED OF CHIEFS OF POLICE AND OTHER LAW ENFORCEMENT PERSONNEL FROM ALL SECTIONS OF THE UNITED STATES AND MORE THAN 67 NATIONS. COMMAND PERSONNEL WITHIN THE UNITED STATES CONSTITUTE MORE THAN 75 PERCENT OF THE ASSOCIATION'S MEMBERSHIP. IACP MEMBERS LEAD AND MANAGE MORE THAN 480,000 LAW ENFORCEMENT OFFICERS AS WELL AS THOUSANDS OF CIVILIAN EMPLOYEES AT THE FEDERAL, STATE AND LOCAL LEVELS. THROUGHOUT ITS EXISTENCE, THE IACP HAS STRIVEN TO ACHIEVE PROPER, CONSCIENTIOUS AND RESOLUTE LAW ENFORCEMENT. IN ALL OF ITS ACTIVITIES, THE IACP HAS BEEN CONSTANTLY DEVOTED TO THE STEADY ADVANCEMENT OF THE NATION'S BEST WELFARE AND WELL-BEING.

WE BELIEVE THAT WELFARE HAS BEEN PUT IN JEOPARDY BY THE IMPOSITION OF THE INFLEXIBLE REQUIREMENTS OF THE FAIR LABOR STANDARDS ACT (FLSA) ON STATE, COUNTY AND MUNICIPAL EMPLOYERS. DURING THESE HEARINGS WHICH BEGAN ON JULY 25, YOU HAVE HEARD TESTIMONY FROM MANY REPRESENTATIVES OF STATES, COUNTIES AND MUNICIPALITIES REGARDING THEIR INABILITY TO MAINTAIN CURRENT LEVELS OF SERVICE WHILE COMPLYING WITH THE FLSA. AS MANY OF THESE PEOPLE HAVE EMPHASIZED, AMONG THE AREAS THAT WILL BE HARDEST HIT IS LAW ENFORCEMENT. I WOULD LIKE ELABORATE FOR YOU ON SOME OF THE PARTICULAR CONCERNS OUR MEMBERS HAVE EXPRESSED.

LAW ENFORCEMENT AGENCIES HAVE THE RESPONSIBILITY OF PROVIDING THE PUBLIC WITH PROTECTION ON A 24-HOUR BASIS. THE ONLY WAY LAW ENFORCEMENT ADMINISTRATORS HAVE BEEN ABLE TO DO THIS IS THROUGH THE FLEXIBILITY THAT HAS BEEN AFFORDED THEM TO SCHEDULE THEIR EMPLOYEES BOTH SWORN AND CIVILIAN, AS NEEDED WITHOUT WORRYING THAT THERE IS NO MONEY LEFT IN THE BUDGET TO PAY OVERTIME. THE FLSA ATTEMPTS TO TAKE INTO CONSIDERATION THE UNIQUE NATURE OF LAW ENFORCEMENT AT SECTION 207(K). THIS SECTION ALLOWS LAW ENFORCEMENT AGENCIES TO REQUIRE OFFICERS TO WORK 171 HOURS OVER A 28-DAY PERIOD. ALTHOUGH THIS GIVES AGENCIES SOME FLEXIBILITY, IT IS NOT ENOUGH.

IN KIRKWOOD, MISSOURI, THE POLICE DEPARTMENT HAS FOUND THAT THE BEST WAY TO SCHEDULE EMPLOYEES WHO HOLD ASSIGNMENTS WHICH MUST BE FILLED 24 HOURS PER DAY INCLUDING SIX CIVILIAN DISPATCHERS, IS TOURS OF DUTY OF 8 1/4 HOURS WITH SIX DAYS ON DUTY, THREE DAYS OFF, SIX DAYS ON AND TWO DAYS OFF DUTY. IN MOST 28-DAY PERIODS, THIS RESULTS IN THE EMPLOYEE WORKING FEWER THAN 171 HOURS BUT IN SOME MONTHS THE NUMBER OF HOURS EXCEEDS 171 AND OVERTIME WILL HAVE TO BE PAID.

THE AMOUNT THAT WILL NEED TO BE PAID IN OVERTIME TO DISPATCHERS WILL BE EVEN GREATER. AS CIVILIAN EMPLOYEES, THESE DISPATCHERS DO NOT COME WITHIN THE SECTION 207(K) PARTIAL EXEMPTION. THEY MUST BE PAID OVERTIME FOR EVERY HOUR WORKED BEYOND 40 HOURS PER WEEK DESPITE THE FACT THAT THE ONLY WAY THIS AGENCY CAN MEET ITS DISPATCHING NEEDS AROUND THE CLOCK IS BY PUTTING DISPATCHERS ON THE SAME SCHEDULE AS ITS SWORN OFFICERS. THIS AGENCY SHOULD NOT BE FORCED TO CHANGE THE SCHEDULE IT HAS FOUND TO BE IN THE BEST INTEREST OF ITS COMMUNITY AND ITS EMPLOYEES. OTHER AGENCIES HAVE FOUND OTHER SCHEDULES THAT MAY RESULT IN MORE THAN 171 HOURS OVER 28 DAYS TO BE MOST EFFECTIVE.

I KNOW THAT MANY OF THE SPEAKERS HAVE RELATED TO YOU THE STORY OF WHAT OCCURRED IN THE DISTRICT OF COLUMBIA RECENTLY WHEN CRIMINAL INVESTIGATORS WERE

TOLD NOT TO WORK OVERTIME, SO I WILL NOT GO INTO IT AGAIN. HOWEVER, I MUST MENTION IT BECAUSE THIS SITUATION CONVINCINGLY ILLUSTRATES WHAT WILL HAPPEN UNDER THE FLSA. THE INTEGRITY AND EFFICIENCY OF INVESTIGATIONS MAY BE COMPROMISED IF THEY MUST BE TURNED OVER FROM OFFICER TO OFFICER AS ONE SHIFT ENDS AND ANOTHER BEGINS. CERTAINLY AGENCIES WILL NOT ALLOW THIS TO HAPPEN IF IT CAN BE AVOIDED BUT WHEN MONEY RUNS OUT THEY WILL HAVE NO CHOICE. THE ALTERNATIVE THEY HAVE HAD WAS TO GRANT COMPENSATORY TIME FOR HOURS WORKED BEYOND THE NORMAL TOUR OF DUTY. THIS ARRANGEMENT WAS SATISFACTORY FOR BOTH THE EMPLOYER AND EMPLOYEES IN MOST CASES. WHEN AN OFFICER IS REQUIRED TO PUT IN THE LONG, STRESSFUL HOURS THAT MAY BE REQUIRED ON A DIFFICULT ASSIGNMENT, THE PROSPECT OF SOME EXTRA TIME OFF IS OFTEN MORE APPEALING THAN A LARGER PAYCHECK.

MOST OF OUR MEMBERS HAVE REPORTED A DECREASE IN MORALE AS A RESULT OF THE GARCIA DECISION. MANY OFFICERS PREFER COMPENSATORY TIME AND ARE NOT HAPPY ABOUT THE PROSPECT OF WORKING OVERTIME WITHOUT "COMP" TIME. IN FACT, THEREIN LIES A FACTOR THAT COMPLICATES THE ABILITY OF AGENCIES TO COMPLY WITH THE FLSA. MANY UNIONS REPRESENTING LAW ENFORCEMENT OFFICERS HAVE NEGOTIATED COLLECTIVE BARGAINING AGREEMENTS THAT CALL FOR THE GRANTING OF COMPENSATORY TIME. OBVIOUSLY THESE AGREEMENTS ARE NO LONGER CONSISTENT WITH THE FLSA SINCE THE ACT DOES NOT GIVE EMPLOYEES THE OPTION OF REQUESTING COMPENSATORY TIME. MANY COLLECTIVE BARGAINING AGREEMENTS WILL NEED TO BE RENEGOTIATED. IN AN EFFORT TO PROTECT EMPLOYEES, THE FLSA HAS TAKEN FROM THEM WHAT THEY PERCEIVED AS A BENEFIT. FURTHER ITS IMPOSITION WITHOUT ANY WARNING HAS PUT MANY AGENCIES IN A VERY DIFFICULT POSITION.

THE PUBLIC LOSES OUT AS WELL. COMPENSATORY TIME HAS BEEN AN ESSENTIAL PART OF EDUCATION INCENTIVE PROGRAMS. IF OFFICERS HAVE ONLY A COUPLE OF WEEKS OF VACATION TIME THEY WILL USE THE TIME FOR REST AND RELAXATION. HOWEVER, IF THEY HAVE ACCUMULATED COMPENSATORY TIME, THEY ARE OFTEN WILLING TO USE THIS TIME TO

ATTEND NON-MANDATORY TRAINING PROGRAMS SUCH AS SPECIAL WEAPONS AND TACTICS TRAINING OR TO ATTEND COLLEGE.

COMPENSATORY TIME HAS ALSO BEEN GIVEN TO OFFICERS WHO PARTICIPATE IN IN-SERVICE AND MANDATORY TRAINING SESSIONS BOTH AS TRAINEES AND AS INSTRUCTORS. IT IS THE PUBLIC THAT BENEFITS FROM A WELL-TRAINED AND BETTER-EDUCATED OFFICER BUT THE ABILITY TO RAISE MORE MONEY TO PAY FOR THIS IS LIMITED, SO CONTINUED TRAINING IS AN AREA THAT WILL SUFFER. SOME AGENCIES HAVE ALREADY CUT THESE PROGRAMS.

ANOTHER MAJOR ISSUE IS THE EFFECT THE OVERTIME PROVISIONS OF THE FLSA WILL HAVE ON RECRUIT TRAINING IN MANY AGENCIES. THE EFFICIENCY AND EFFECTIVENESS OF ANY LAW ENFORCEMENT AGENCY IS DIRECTLY RELATED TO THE TRAINING RECEIVED BY ITS PERSONNEL. TYPICALLY UNIFORMED PERSONNEL ARE REQUIRED TO SUCCESSFULLY COMPLETE AN EXTENSIVE COURSE OF ACADEMIC AND PHYSICAL INSTRUCTION PRIOR TO ASSUMING THEIR DUTIES. THIS NORMALLY CANNOT BE ACCOMPLISHED IN A 40-HOUR WORK WEEK. THE CALIFORNIA HIGHWAY PATROL RECRUITS ARE REQUIRED TO WORK 53 HOURS A WEEK DURING 20 WEEKS OF TRAINING. THE ARIZONA DEPARTMENT OF PUBLIC SAFETY REQUIRES LAW ENFORCEMENT RECRUITS TO PUT IN 54 HOURS PER WEEK. IN PAYETTE, IDAHO, POLICE RECRUITS TRAIN 60 HOURS A WEEK. THERE ARE MANY AGENCIES THAT FOLLOW SIMILAR SCHEDULES IN ORDER TO PUT WELL-TRAINED OFFICERS ON DUTY AS QUICKLY AS POSSIBLE. IF THESE AGENCIES ARE FORCED TO PAY OVERTIME FOR TRAINEES, THEY WILL HAVE TO CONSIDER SEVERAL ALTERNATIVES NONE OF WHICH IS ACCEPTABLE.

ONE ALTERNATIVE WOULD BE TO CUT BACK THE NUMBER OF HOURS OF TRAINING BY REDUCING THE CURRICULUM, HOWEVER, THIS WILL RESULT IN THE GRADUATION OF EMPLOYEES WHO ARE LESS PREPARED TO ASSUME LAW ENFORCEMENT DUTIES. THIS COULD AFFECT BOTH THE OFFICER'S AND THE PUBLIC'S SAFETY. NEVERTHELESS, SEVERAL AGENCIES, PARTICULARLY SOME OF THE SMALLER AGENCIES HAVE REPORTED THAT THEY

WILL BE FORCED TO DO THIS. AT LEAST FOUR STATE POLICE AGENCIES HAVE INFORMED US THAT THEY WILL ALSO BE CUTTING BACK ON THEIR TRAINING. LAW ENFORCEMENT HAS MADE GREAT STRIDES OVER THE YEARS IN ACHIEVING PROFESSIONALISM. THAT IS ONE OF THE GOALS FOR WHICH IACP WAS CREATED ALMOST 100 YEARS AGO. RECRUIT TRAINING HAS BEEN AN ESSENTIAL PART OF LAW ENFORCEMENT'S SUCCESS IN ACHIEVING THAT GOAL. IT IS VERY DISHEARTENING TO SEE THAT WE MAY HAVE TO TAKE A STEP BACK BECAUSE OF A FEDERALLY IMPOSED LAW THAT DOES NOT TAKE INTO CONSIDERATION THE SPECIAL NEEDS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES.

ANOTHER ALTERNATIVE IS TO CUT BACK THE NUMBER OF HOURS OF TRAINING PER WEEK BUT EXTEND THE NUMBER OF WEEKS OF TRAINING. THE INFORMATION PROVIDED TO US BY THE MANY AGENCIES THAT WILL BE DOING THIS MAKES CLEAR THAT THIS WILL BE VERY COSTLY. IN CHANGING FROM A 16-WEEK TRAINING PROGRAM TO A 23-WEEK PROGRAM, THE MICHIGAN STATE POLICE ESTIMATES ADDITIONAL COSTS OF \$64,000 IN MEALS, LODGING, MILEAGE AND A SMALL AMOUNT OF OVERTIME. THE NEVADA STATE POLICE ANTICIPATE THAT TRAINING COSTS WILL INCREASE BY APPROXIMATELY \$25,000 PER TRAINING ACADEMY. TRAINING COSTS FOR THE NASHVILLE METROPOLITAN POLICE DEPARTMENT WILL INCREASE BY ABOUT \$17,000.00. INCREASING THE LENGTH OF THE TRAINING PERIOD WILL KEEP EMPLOYEES IN A NONPRODUCTIVE STATUS FOR A LONGER PERIOD AND COULD BE EXPECTED TO INCREASE THE DROPOUT RATE, FURTHER INCREASING THE COST PER GRADUATE. IT MIGHT ALSO ACT AS A RECRUITMENT BARRIER, PARTICULARLY FOR THE BETTER-QUALIFIED CANDIDATES.

FINALLY, THE AGENCY COULD PAY THE OVERTIME. GIVEN THE REALITY THAT UNLIMITED FUNDS WILL NOT BE GIVEN TO LAW ENFORCEMENT AGENCIES FOR PAYING OVERTIME, THIS WOULD MEAN TAKING THOUSANDS OF DOLLARS AWAY FROM ENFORCEMENT ACTIVITIES TO PAY NONPRODUCTIVE RECRUITS OVERTIME. THE CALIFORNIA HIGHWAY PATROL ESTIMATES THAT CONTINUING ITS CURRENT PROGRAM AND PAYING OVERTIME WILL RESULT IN APPROXIMATELY A 49 PERCENT INCREASE IN THE CADET SALARY, BECAUSE OF OVERTIME, AND PLACE IT CLOSE TO THE TOP STEP OF THE STATE TRAFFIC SERGEANT SALARY RANGE.

UPON GRADUATION FROM THE ACADEMY AND ASSIGNMENT AS A STATE TRAFFIC OFFICER, EACH CADET WOULD EXPERIENCE ABOUT A 33 PERCENT CUT IN PAY. THIS OBVIOUSLY WOULD BE AN UNTENABLE SITUATION. INCREASED COSTS FOR THE CURRENT PROGRAM WILL APPROXIMATE \$1,200,000 BASED ON TRAINING 240 NEW OFFICERS PER YEAR. THE MARYLAND STATE POLICE ESTIMATES THAT PAID OVERTIME WOULD RESULT IN AN ADDITIONAL COST OF \$5,500 PER GRADUATE. THE NEXT CLASS WILL PROBABLY GRADUATE 45 OUT OF 60 RECRUITS AT A COST OF \$247,500 IN OVERTIME ALONE. IN LEVITTOWN, PENNSYLVANIA, THE MIDDLETOWN TOWNSHIP POLICE DEPARTMENT REPORTS THAT TRAINING COSTS WILL INCREASE BY \$10,000 WHICH IS A SUBSTANTIAL AMOUNT FOR THIS 45-PERSON FORCE.

COMPOUNDING THE PROBLEM OF RECRUIT TRAINING IS THE FACT THAT IN MANY CASES RECRUITS ARE NOT SWORN IN (I.E., GIVEN THE POWER TO ENFORCE THE LAWS AND MAKE ARRESTS) UNTIL AFTER COMPLETION OF THEIR TRAINING. IN A SURVEY CONDUCTED BY THE IACP, WE FOUND THAT THE OVERWHELMING MAJORITY OF STATE POLICE AGENCIES AND ABOUT HALF OF THE MUNICIPAL POLICE AGENCIES THAT RESPONDED FOLLOW THIS PRACTICE. WHAT THIS MEANS IS THAT THESE EMPLOYEES DO NOT COME WITHIN THE EXEMPTION OF SECTION 207(K) WHILE THEY ARE IN TRAINING. THE LEEWAY GIVEN TO LAW ENFORCEMENT AGENCIES OF 11 HOURS DURING A 28-DAY PERIOD IS UNAVAILABLE FOR RECRUITS AND THEY MUST, THEREFORE, BE GIVEN OVERTIME PAY FOR ANY HOURS WORKED BEYOND FORTY HOURS PER WEEK. THIS COULD BE A CONSIDERABLE DIFFERENCE PARTICULARLY IN LARGE AGENCIES WHICH TRAIN MANY NEW OFFICERS EACH YEAR. AT THE VERY LEAST WE WOULD ASK CONGRESS TO INCLUDE LAW ENFORCEMENT TRAINEES WITHIN THE SECTION 207(K) PARTIAL EXEMPTION.

OTHER PROGRAMS ARE ALSO IN JEOPARDY, PARTICULARLY TAKE-HOME CAR PROGRAMS. TAKE-HOME CAR PROGRAMS WERE STARTED IN MOST AGENCIES ABOUT 10 YEARS AGO AS A COST EFFECTIVE MEANS OF INCREASING THE POLICE PRESENCE IN THE COMMUNITY WITHOUT HAVING TO INCREASE MANPOWER. OFFICERS ARE ASSIGNED A VEHICLE AFTER VOLUNTEERING TO PARTICIPATE IN THE PROGRAM, WHICH THEY DRIVE TO AND FROM HOME.

THOUGH OFFICIALLY OFF-DUTY DURING THAT TRAVEL TIME, OFFICERS GENERALLY ARE REQUIRED TO RESPOND TO ANY SITUATION THEY ENCOUNTER OR AN EMERGENCY CALL THEY RECEIVE DURING THAT TIME. NORMALLY THESE OFFICERS ARE NOT PAID FOR THE TIME SPENT HANDLING A CALL AT LEAST UP UNTIL A CERTAIN AMOUNT OF TIME HAS BEEN SPENT. FOR EXAMPLE, IN ONE AGENCY OFFICERS ARE NOT PAID FOR THE FIRST TWO HOURS SPENT RESPONDING TO AN INCIDENT DURING THEIR OFF-DUTY HOURS. IN THAT AGENCY, 1150.25 HOURS WERE SPENT BY OFF-DUTY OFFICERS ON 3,407 INCIDENTS LAST YEAR. VERY SELDOM DID AN OFFICER SPEND MORE THAN TWO HOURS ON ANY INCIDENT. USUALLY THE MATTER WAS EASILY TURNED OVER TO AN ON-DUTY OFFICER. THE PUBLIC, THEREFORE, RECEIVED THE BENEFIT OF MOST OF THOSE HOURS WITHOUT THE NEED TO EXPEND TAX DOLLARS ON OVERTIME PAY. IF AGENCIES MUST PAY FOR THESE HOURS, MANY WILL HAVE TO SERIOUSLY CONSIDER DROPPING THIS PROGRAM. WE ALSO QUESTION THE EXTENT OF THE LIABILITY THE FLSA CREATES WITH REGARD TO THESE PROGRAMS. BECAUSE OFFICERS ARE REQUIRED TO TAKE ACTION WHEN IN THEIR POLICE VEHICLE, WILL THE TOTAL TIME SPENT COMMUTING BE CONSIDERED HOURS WORKED? CONGRESS DEMONSTRATED ITS SUPPORT OF TAKE-HOME-CAR PROGRAMS BY ENACTING PUBLIC LAW 99-44 EARLIER THIS YEAR. WE HOPE YOU WILL NOT LET THE FLSA PUT AN END TO THEM. A POLICE OFFICER IS A POLICE OFFICER 24 HOURS A DAY. IF HE ENCOUNTERS A BURGLARY WHILE IN A SHOPPING PLAZA WITH HIS FAMILY ON HIS DAY OFF AND INVOLVES HIMSELF IN THE SITUATION, MUST HIS AGENCY PAY HIM TIME AND ONE-HALF FOR HIS SERVICES? AGENCIES CANNOT BE EXPECTED TO ORDER THEIR OFFICERS NOT TO INTERVENE IN A SITUATION ON THEIR OFF-DUTY TIME. THIS WOULD DO THE PUBLIC A GREAT DISSERVICE AND YET WHERE WILL THE MONEY COME FROM TO PAY THIS UNEXPECTED OVERTIME?

ANOTHER AREA OF IMPORTANCE AFFECTED BY THE FLSA IS AN AGENCIES ABILITY TO IMPOSE DISCIPLINE UPON AN ERRANT EMPLOYEE WITHOUT MONETARILY AFFECTING THE FAMILY. MANY POLICE AGENCIES HAVE HISTORICALLY ASSIGNED EXTRA HOURS OF DUTY EITHER IN THE FORM OF AN EXTENDED SHIFT OR THE CANCELLATION OF LEAVE DAYS AND

ASSIGNING EXTRA DUTY AS DISCIPLINARY PUNISHMENT. UNDER THE FLSA THIS FORM OF PUNISHMENT IS NO LONGER POSSIBLE. WHILE IT IS TRUE, THAT THE EMPLOYEE IS WORKING FOR NO COMPENSATION UNDER THIS FORM OF PUNISHMENT, THERE IS NO DIMINUTION OF SALARY AND CONSEQUENTLY THE FAMILY AND THE ABILITY TO MEET FINANCIAL OBLIGATIONS ARE NOT ADVERSELY AFFECTED. IT DOES DEPRIVE THE EMPLOYEE OF FREE TIME, BUT IN MOST CASES IT IS DONE VOLUNTARILY AND IN ALMOST EVERY CASE THIS IS PREFERABLE TO A MONETARY FINE OR A SUSPENSION WITHOUT PAY WHICH ARE THE ONLY AVENUES OF PUNISHMENT LEFT OPEN FOR REPEATED OFFENSES OR VIOLATIONS THAT DEMAND MORE THAN JUST A REPRIMAND. SMALLER AGENCIES MAY NOT BE ABLE TO SUSPEND OFFICERS WITHOUT LEAVING THEMSELVES UNDERSTAFFED. REQUIRING OFFICERS TO WORK EXTRA HOURS MAY BE THE MOST FEASIBLE SOLUTION AND RESULTS IN BETTER POLICE COVERAGE OF THE JURISDICTION WHILE THESE OFFICERS ARE ON DUTY.

ANOTHER AREA OF CONCERN IN SOME AGENCIES IS THE FUTURE OF SOME OF THEIR YOUTH PROGRAMS. ONE SUCH PROGRAM IS A ONE WEEK SUMMER CAMP FOR CHILDREN WHO ARE FIRST OFFENDERS OR UNDERPRIVILEGED. THIS PROGRAM IS FUNDED BY THE POLICE DEPARTMENT AND CONTRIBUTIONS FROM THE PUBLIC. EACH YEAR POLICE OFFICERS VOLUNTEER TO PARTICIPATE IN THE PROGRAM AS COUNSELORS. THOSE OFFICERS SELECTED FROM AMONG THE MANY APPLICANTS ARE RELIEVED OF THEIR REGULAR DUTIES FOR THE WEEK AND LIVE AT THE CAMP WITH THE CHILDREN FROM MONDAY MORNING UNTIL FRIDAY EVENING. THE AGENCY PAYS THEM THEIR REGULAR SALARY DURING THIS TIME. THE ISSUE HAS NOW BEEN RAISED AS TO WHETHER THE OFFICERS WILL HAVE TO BE PAID OVERTIME FOR ALL HOURS SPENT AT THE CAMP BEYOND A REGULAR TOUR OF DUTY SINCE THE FLSA HAS PUT INTO QUESTION CERTAIN VOLUNTEER ACTIVITIES.

FEDERALLY MANDATING THE CASH PAYMENT OF OVERTIME IS CLEARLY DETRIMENTAL TO PUBLIC SAFETY AND THE PUBLIC INTEREST. MONETARY, HUMAN AND MATERIAL RESOURCES ARE SUBJECT TO STATE REVENUES AND LEGISLATIVE DISCRETION. WHILE THE COST OF A PRODUCT FROM THE PRIVATE SECTOR MAY BE INCREASED, READILY ACCOMPLISHED, AND PUBLICLY ACCEPTED, AN INCREASE IN TAXATION TO OFFSET PUBLIC AGENCY OPERATION

COSTS IS NEITHER READILY ACCOMPLISHED NOR IS IT EASILY ACCEPTED BY TAXPAYERS, REGARDLESS OF THE JUSTIFICATION PROVIDED.

FURTHERMORE, THE PRIVATE SECTOR MAY BE ABLE TO TAKE A MORE LIBERAL PROACTIVE APPROACH TO OPERATIONAL PROBLEMS AND CONTROL, FORECAST AND PROLONG THE IMPLEMENTATION OR RESPONSE FOR NEW PRODUCTS OR SERVICES UNTIL REVENUES ARE INCREASED. HOWEVER, LAW ENFORCEMENT AGENCIES MUST OPERATE IN A MORE REACTIVE MODE TO MEET MANY UNCONTROLLABLE, UNFORESEEN PUBLIC NEEDS AT THE TIME OF OCCURRENCE, SUCH AS ACCIDENTS, EMERGENCIES, DISASTERS, CRIMES IN PROGRESS, AND SO FORTH. AN EXCELLENT EXAMPLE OF THIS HAS JUST OCCURRED ALONG THE GULF COAST WHERE HURRICANE ELANA LOOMED FOR SEVERAL DAYS BEFORE FINALLY STRIKING IN MISSISSIPPI. WE DO NOT HAVE A TALLY OF THE NUMBER OF OVERTIME HOURS THAT WERE WORKED PRIOR TO THE STORM WHEN MANY OFFICERS WERE NEEDED TO ASSIST IN EVACUATION EFFORTS AND OTHER PREPARATIONS AND THAT ARE STILL BEING WORKED DURING THE RECOVERY PERIOD BUT WE CAN BE CERTAIN THAT THE NUMBER IS CONSIDERABLE. ANOTHER EXAMPLE OCCURRED IN CONNECTICUT TWO YEARS AGO. ON JUNE 28, 1983, AT 1:30 A.M. THE EASTBOUND SPAN OF INTERSTATE 96 OVER THE MIANUS RIVER IN REENWICH, CONNECTICUT, COLLAPSED SENDING TWO TRACTOR/TRAILERS AND ONE CAR INTO THE RIVER BELOW, KILLING THREE PEOPLE. THE 35-MILE STRETCH OF I-95 THAT INCLUDED THE BRIDGE IS NORMALLY PATROLLED BY THREE PATROL CARS FROM TROOP G OF THE CONNECTICUT STATE POLICE. TWENTY FIVE ADDITIONAL SWORN MEMBERS WERE AT THE SCENE WITHIN TWO HOURS AFTER THE COLLAPSE, INCLUDING EMERGENCY SERVICES PERSONNEL, SCUBA SQUADS, TRAFFIC SQUADS, MOTORCYCLES, INVESTIGATORS AND COMMANDERS.

EIGHTY-NINE THOUSAND SIX HUNDRED (89,600) VEHICLES PASS OVER THIS POINT DAILY AND THE TROOP WAS NOT EQUIPPED TO HANDLE THE TRAFFIC CONTROL PROBLEMS ASSOCIATED WITH THE EMERGENCY. DURING THE ELEVEN MONTHS THE CONNECTICUT STATE POLICE WERE DEPLOYED AT THE BRIDGE, TROOPERS (AS MANY AS 80 A DAY) WERE SENT FROM ALL ACROSS THE STATE TO ASSIST AT THE SCENE. CERTAINLY THIS SITUATION

COULD NOT HAVE BEEN SUCCESSFULLY MANAGED WITHOUT MANY DEDICATED TROOPERS WORKING MANY HOURS BEYOND THEIR NORMAL TOURS OF DUTY.

BECAUSE OF THIS UNPREDICTABLE NATURE OF LAW ENFORCEMENT WORK, IF AGENCIES ARE REQUIRED TO COMPLY WITH THE FLSA, IT CAN BE EXPECTED THAT AS OVERTIME FUNDS DIMINISH DURING THE COURSE OF EACH FISCAL YEAR, SO WILL LAW ENFORCEMENT AVAILABILITY. NEITHER HURRICANE ELANA NOR THE MIANUS BRIDGE COLLAPSE COULD HAVE BEEN PREDICTED. IT IS TOTALLY UNACCEPTABLE FOR THE LEVEL OF LAW ENFORCEMENT SERVICE TO BE DEPENDENT ON FINANCES RATHER THAN THE CRITICAL NATURE OF THE TASK TO BE UNDERTAKEN.

FOR ALL OF THE ABOVE REASONS WE URGE YOU TO QUICKLY ENACT LEGISLATION THAT WILL EXEMPT LAW ENFORCEMENT AGENCIES FROM THE PROVISIONS OF THE FLSA. LAW ENFORCEMENT ADMINISTRATORS MUST RETAIN THE AUTHORITY TO ASSESS FOR THEIR OWN AGENCY WHAT THE PUBLIC SAFETY NEEDS OF THE COMMUNITY ARE AND HOW TO BEST MEET THOSE NEEDS.

THANK YOU.

Senator NICKLES. Chief Stewart?

Chief STEWART. Yes, thank you, Senator Nickles and Senator Matsunaga and members of the committee.

We have some other points that we would like to bring out, and I will do that very quickly, if I can.

I am John B. Stewart, Jr., fire chief of the city of Hartford, CT, appearing today on behalf of the International Association of Fire Chiefs.

The IAFC is a professional organization representing 7,000 senior officials in fire agencies and communities across the Nation, including both professional fire departments of our major cities and urban centers, and our volunteer services in numerous communities in every State.

Mr. Chairman, we have prepared and submitted a more extensive written statement for the record, which explores more fully the impact of the *Garcia* ruling. However, in the interest of time, we are going to condense this even further.

Senator NICKLES. Thank you very much. We will enter the entire statements of all the witnesses in the record, and we appreciate your cooperation.

Chief STEWART. Thank you very much.

As you well know, in extending the FLSA's coverage to firefighters in 1974, Congress made special provisions for the unique staffing and public protection requirements of fire and police departments. Most significant is providing a limited exemption from strict overtime requirements by allowing firefighters to work a greater number of hours before they became eligible for overtime compensation, and it provided a stage-in period for such new obligations.

The Labor Department was directed to study the average number of hours worked by firefighters across the country, for purposes of establishing a permanent overtime threshold.

However, before the statutory obligation and overtime statutes went into effect, the extension of the FLSA was found to be unconstitutional, as we all know. The application of the overtime provisions of the FLSA would add significantly to the wage costs of numerous fire departments, particularly in the South and West. In addition, regulations previously promulgated by the Labor Department, which it now seems to apply for the first time, threaten to do severe harm to the operations of volunteer fire departments and combination departments.

To be sure, while some effect would be felt by all fire agencies, certain departments are not likely to face tremendously increased costs. Many of these are located in the Northeast and have over the years adopted schedules and work schedules which would not impose overtime obligations under existing FLSA. My own city of Hartford is an illustration. Over a period of many years, through many rounds of bargaining with the union representing our firefighters, the number of hours which they have worked have been reduced to the point that scheduled hours do not require overtime.

However, other fire departments, such as, for instance, Milwaukee, WI, face \$4 million; Long Beach, CA, \$1.4 million; Dallas, TX, \$1.2 million; Cleveland, OH, \$1 million; Salt Lake City, UT, and Honolulu, HI, \$1.2 million, and San Diego, CA, \$1.2 million.

In addition, we believe that medium-size and smaller cities, particularly those in the South and West will face proportionately more dramatic increases in wage costs since they are less likely to have reduced work hours in the past under labor or legislative pressures.

These problems have been dramatically compounded by the apparent immediate application of the 212-hour overtime threshold figure adopted by the Labor Department in 1983 for a 28-day period. Instead of the phase-in period envisioned by Congress when first covering fire departments, we face the immediate application of an overtime threshold below that of any phased-in thresholds which Congress originally sought to apply in 1974.

For these and many other reasons, we wholeheartedly support the bill that you have worked so hard for, and your cosponsors.

It is hoped that such reform exemption measures would exempt fire protection employees from overtime coverage. If this is not the case, Congress should at least look to other ways to allow fire departments to utilize a comp time arrangement in lieu of paid overtime for a length of time which is longer than the pay period so stated. In addition, we believe that the 212-hour overtime threshold figure for a 28-day work cycle should be increased, at least to 224 hours and a typical 56-hour workweek, without creating any overtime liability.

Finally, we wish to emphasize the severe impact which FLSA and the Labor Department regulations will have on volunteers. Volunteers are the heart of America. And I would like to state briefly a shining example of District Chief Francis Miller, from Chesterfield County, who will briefly, in one page, show you the impact of what would happen to our great American spirit of volunteerism as it affects fire safety.

[The prepared statement of Chief Stewart follows:]

INTERNATIONAL ASSOCIATION OF FIRE CHIEFS • INCORPORATED

1329 18th STREET, N.W. • WASHINGTON, D.C. 20036



AREA CODE 202
833-3420

STATEMENT OF
THE INTERNATIONAL ASSOCIATION OF FIRE CHIEFS, INC.

PRESENTED BY
CHIEF JOHN B. STEWART, JR.
HARTFORD, CONNECTICUT

BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES

SEPTEMBER 10, 1985

REGARDING
THE APPLICATION OF THE FAIR LABOR
STANDARDS ACT TO STATE AND LOCAL
FIRE AGENCIES

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STATEMENT OF
THE INTERNATIONAL ASSOCIATION OF FIRE CHIEFS, INC.

BEFORE THE
SUBCOMMITTEE ON LABOR
OF THE UNITED STATES SENATE
COMMITTEE ON LABOR AND HUMAN RESOURCES

SEPTEMBER 10, 1985

I.

PRELIMINARY STATEMENT

The International Association of Fire Chiefs, Inc. ("IAFC") is submitting this statement in support of efforts to amend the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. ("FLSA") with respect to the coverage of fire fighters employed by state and local governments. The IAFC is a voluntary professional membership society numbering approximately 7,000 members, comprised of senior fire officials responsible for the protection of life and property throughout the United States and abroad. The IAFC is the major national professional association representing the interests of senior management in the fire service.

Fire agencies in the United States range in size from major urban fire departments employing thousands of professional fire fighters to rural departments relying on the efforts and dedication of a small number of volunteers. They include public agencies where employees are represented by labor organizations and are subject to collective bargaining agreements and memoranda of understanding, and those in which employees are not represented by unions or operating under written contracts. These fire fighters all share a dedication to serving the interests of public safety, often in the face of great personal danger. As is well-recognized, the operations of public fire agencies are undeniably part of the core of critical functions of government across this country.

Since the Supreme Court's recent ruling in the case of Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L. W. 4135 (February 19, 1985), managers of both large and small fire agencies have focused on the extraordinarily increased costs of maintaining existing operations under the FLSA. Those costs are generally related to the mandatory overtime requirements of the statute and its implementing regulations. While certain fire departments have faced lesser hardships in making adjustments (due to their prior adoption of comparable overtime practices or their establishment through collective bargaining),

many other agencies have calculated a potential liability for vastly increased amounts of compensation which threatens the integrity of their departmental budgets. Adding to this concern has been the history of the FLSA's extension to public fire agencies, uncertainty concerning the effective date of the Supreme Court's action, and the U.S. Department of Labor's lengthy delay in providing meaningful guidance concerning this dramatic reversal in pre-existing law. The members of the IAFC and the fire agencies which they head have been attempting to deal with the new obligations and responsibilities imposed by the FLSA. We appear today to support the efforts of Senator Nickles and the other members of Congress who have recognized the pressing need for immediate action in this area. We urge the members of this panel to take the lead in providing relief to state and local fire agencies, so as to assure the continued protection and safety of our citizenry, and to avoid the imposition of excess wage costs at a time of decreasing local revenues and limitations on the taxation ability of states and localities.

II.

HISTORY OF FLSA TREATMENT OF FIRE FIGHTERS

In 1974, Congress amended the FLSA to extend coverage to many of the public employees at the state and local levels who

previously were exempt from its provisions. P.L. 93-259, 88 Stat. 55 (April 8, 1974). In expanding the statute's coverage of public sector employees, Congress made special provisions for the unique practices and requirements of fire agencies, including a complete overtime exemption for very small departments. 29 U.S.C. § 213(b)(20). Significantly, fire protection agencies were provided with a limited exemption from overtime standards. Under Section 7(k) of the FLSA, 29 U.S.C. § 207(k), and regulations promulgated thereunder, fire agencies do not incur liability for overtime until the number of hours worked exceeds 212 hours in a 28-day work period, or a proportionally lower number of hours in work periods of less than 28 days but more than 7 days. Finally, while the major portion of the Fair Labor Standards Amendments of 1974 went into effect on May 1, 1974, the overtime requirements imposed by Section 7(k) applicable to fire protection agencies were not scheduled to take effect until January 1, 1975. It is also critically important to note that Congress provided a "phase-in" period of nearly four years from the date of enactment until the final overtime threshold for fire fighters went into effect.

Following the enactment of the 1974 FLSA amendments, the Department of Labor and its Wage and Hour Division conducted a study to determine the average number of hours worked by the

nation's public safety employees. The survey was required by Section 6(c)(3) of the 1974 amendments, which provided that the average determined by the study would determine the overtime standard which would apply to such employees starting in 1978. While the Supreme Court's ruling in National League of Cities, et al. v. Usery, 426 U.S. 833 (1976), prevented the application of that standard to state and local workers, the Department of Labor proceeded with its analysis. Following litigation which directed the inclusion of certain state and local survey data, Jones v. Donovan, 25 WH Cases 380 (D.D.C. 1981), aff'd per curiam, No. 80-1615 (D.C. Cir. 1982), the Labor Department promulgated the results of the study's recomputation which produced a fire protection maximum hours average of 212. 48 Fed. Reg. 40518 (September 8, 1983). This figure was heavily influenced by the lower number of hours worked by fire fighters in the Northeast region of the country, where the average hours worked by fire fighters were significantly lower than in the West and the South. Following the Supreme Court's decision in Garcia, the Wage and Hour Division noted that 212 hours in a 28-day period is the maximum figure which can be worked before overtime obligations are incurred by state and local fire agencies. State and Local Government Employers Under the Fair Labor Standards Act ("DOL Study"), Publication No. 1459 (Wage and Hour Division, May 1985).

III.

THE IMPACT OF GARCIA ON FIRE AGENCIES

As has been described by state and municipal spokesmen before this Committee, as well as many other forums, the result of the Supreme Court's abrupt policy reversal earlier this year is that public employers across the country are now subject to large amounts of unbudgeted financial liability. For many states and localities, these obligations arise in the midst of a fiscal year and during the term of a collective bargaining agreement which establishes work periods and scheduling systems. As the result of these circumstances, and the staffing patterns and requirements which are necessary to ensure the public safety and provide essential services, managers of many state and local agencies facing severe budget problems.

No sector of public services has faced a more critical challenge in the area of FLSA-imposed compensation costs than fire agencies in communities across the country. As is obvious to all, the nature of the public fire service and emergency response mechanisms make it difficult if not impossible for municipal fire managers to precisely quantify, schedule, limit and delineate the work hours of their employees. As chiefs in many jurisdictions have discovered to their dismay, scheduling

patterns traditionally utilized by fire agencies in large and small communities will lead to regular accrual of overtime compensation under the FLSA. In addition, the elimination of compensatory time off in lieu of cash compensation for excess hours will have a major impact on the wage costs of fire agencies, and will preclude a scheduling practice highly valued by fire service employees. Significantly, volunteer fire agencies, and combination fire departments (i.e., those which employ professional fire fighters but also rely on the services of volunteers) face extremely serious fiscal and staffing problems as the result of the Garcia ruling and the Labor Department's regulations.

At the hearings previously held by this Subcommittee, and in numerous other settings, public officials and spokesmen for municipal organizations have described the huge financial costs which will be associated with the full implementation of the FLSA in the public sector. These assessments have been challenged by various labor representatives, who have argued that such cost estimates have been inflated, are inaccurate or represent the efforts of employers seeking to avoid just and reasonable compensation costs. The propriety and wisdom of the intervention of the Federal government into the employee and labor relations policies of state and local employers can be debated by constitutional scholars. However, our organization

is present to testify that such costs are real, that they will create serious problems for many emergency service managers in communities across our nation, and that the dollar figures involved represent serious costs for numerous local communities.

The IAFC surveyed the 100 largest fire services in metropolitan areas of the country, and has received estimates regarding the cost of FLSA implementation in many of these fire agencies. To be sure, FLSA compliance will not impose greatly increased compensation costs in certain cities. These are communities which have in the past adopted comparable practices, either unilaterally, in response to local legislation or through the collective bargaining process.

However, our survey indicated that in many major cities, the anticipated increases in wage costs of fire departments across the country will have a serious impact. For example, the Fire Chief in Milwaukee, Wisconsin, estimates that wage costs will increase \$4 million on an annual basis as the result of FLSA implementation. Similarly, we have been advised that fire chiefs anticipate substantially increased costs in Dallas, Texas (\$1.2 million), Long Beach, California (\$1.4 million), Honolulu, Hawaii (\$700,000), Cleveland, Ohio (\$1 million), Salt Lake City, Utah (\$1.2 million), San Diego, California (\$1.2 million) and

Phoenix, Arizona (\$300,000). Fire departments in other cities, such as San Antonio, Texas, estimated that FLSA compliance will add up to 11.3% in increased wage costs, while the Grand Rapids, Michigan, fire department anticipates a 9.1% increase, and the Rochester, New York, fire department expects a 6% increase. While certain of these figures may not appear to require major expenditures, it is critical to recognize that they appear within a budget framework in which fire fighter compensation costs already account for 85-90 percent of expenditures, and where few department budgets contain sufficient discretionary funds to satisfy such additional obligations.

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This recitation is merely illustrative of the budget and compensation problems now faced by communities across the country. In point of fact, we believe that an even greater impact is likely to be felt by smaller and medium-sized cities not included in our survey. Fewer of these jurisdictions have been subject to the labor and local legislative pressures which have caused many major cities (particularly in the Northeast) to reduce scheduled working hours of fire fighters over the years.

Underscoring the problems faced by these cities is the fact that the Garcia ruling and the Labor Department's enforcement policy create these budget strains in the immediate fiscal

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year. Contrary to Congress' intention when it established a "phase-in" period of nearly four years prior to the establishment of current overtime thresholds for public safety workers, it now appears that public employers became immediately liable for overtime hours worked in excess of 212 hours in a 28-day periods. Since we feel that such application contravenes the spirit and intention of the 1974 Amendments, the IAFC supports the legal action instituted by the City of Los Angeles in Federal court in California. In City of Los Angeles v. Brock, Case No. 85-5341 MRP (JRX) (C.D. Cal., Complaint filed August 13, 1985), the city has filed an action seeking declaratory and injunctive relief, requiring the Department of Labor to provide a phase-in of overtime provisions applicable to state and local public safety employees. The IAFC believes that such an order is both appropriate, in light of the legislative and judicial history of this issue, and a practical necessity if public employers are to continue to provide effective fire protection service while working -- and budgeting -- toward FLSA compliance. However, given the uncertainty which will exist during the period of litigation (which may include a lengthy appeal process), an immediate legislative solution is both necessary and desirable.

Perhaps even more importantly, the IAFC submits that the impact of the FLSA on volunteer and combination fire services

demands the immediate attention of Congress for remedial action. There are approximately one million volunteer fire fighters across the United States, who bravely and unselfishly offer their services for the protection of their own and neighboring communities. Some of our nation's best examples of community-minded good citizenship, these volunteers have stepped forward not for purposes of gaining compensation, but to voluntarily provide for the safety and security of their families and neighbors. However, because of the language and framework of the FLSA and the implementing regulations issued by the Department of Labor at 29 C.F.R. Part 553, many of our nation's volunteer fire operations now face serious threats to their continued operation.

The Labor Department regulations provide that professional fire fighters cannot also serve as volunteers for their employing fire agencies. While this may, in theory, appear to be a reasonable measure designed to avoid employer coercion or exploitation, it may needlessly disrupt the operations of combination fire departments. In many instances, paid fire fighters who work at one fire station in a given county volunteer their services at a distant fire station in the same county near the location of their homes. Due to scheduling practices at their paid fire stations, such fire fighters often provide critical

well-trained and experienced staffing for the fire stations at which they volunteer. Moreover, such professional fire fighters are an important source of training and expertise for the remainder of the volunteer force at the fire stations near their homes.

Section 553.11 of the regulations also indicate that fire department volunteers will generally lose that status if they receive payments in excess of \$2.50 per call to cover travel and other expenses of their service. The practical effect of this regulation at the local level, if the statute is not amended, is that public agencies will no longer provide reimbursement above that threshold figure to volunteers, or it will roll back customarily higher payments for fear of submitting to "employee" status, and resulting minimum wage and overtime obligations.

Another source of problems for combination fire departments are the restrictions on volunteer activity where "mutual aid" agreements exist between jurisdictions, whereby the fire fighting forces of one area respond to emergency calls in adjacent jurisdictions. The Labor Department's regulations provide that if employees in one jurisdiction voluntarily respond to an emergency call in a neighboring jurisdiction, the hours worked by such employees will be compensable hours worked if a "mutual aid"

agreement exists between the two jurisdictions. 29 C.F.R. § 553.10. While such requirements make the provision of such "voluntary" services less likely (since the employing jurisdiction will be required to pay for such services), on a practical level, these "mutual aid" limitations may further reduce the pool of experienced volunteers available in our nation's volunteer-served areas.

For example, a professional fire fighter employed in County X resides in adjacent County Y and wishes to volunteer his services to that latter jurisdiction. While the "reach" of the Labor Department's regulations have not been clarified by court rulings or advisory opinions, it is clear that the professional fire fighter could not voluntarily provide service to County Y if it has a mutual aid agreement with the jurisdiction which employs him, and an emergency call comes concerning a fire in County X. Such intricate and disruptive rules are certain to have a significant impact on public safety arrangements in numerous parts of the country, and are likely to deprive our nation's communities of the enhanced protection which these dedicated fire fighters wish to provide.

IV.

NECESSARY CONGRESSIONAL ACTION

The IAFC and its membership are most appreciative of the leadership demonstrated by Senator Nickles, Senator Wilson and the other Senators and Representatives who have recognized the gravity of the problem facing state and local governments as the result of the Garcia ruling. We join the unanimous and urgent call of municipal and county organizations for prompt remedial action to relieve public employers of the costly and unanticipated expense of overtime liability, and the severe restrictions on the services of volunteers in local fire services and elsewhere. We thus wholeheartedly support S. 1570, and believe that its provisions will address virtually all of the concerns of fire service management across the country.

Given the controversy which has historically enveloped the issue of FLSA coverage of public employees and the anticipated debate over any reform measure, we wish to emphasize the individual remedial components which are necessary to provide relief to fire agencies. Initially, we believe that state and local fire fighters should be exempted from the overtime provisions of the FLSA, through the comprehensive language of S. 1570, or the more limited measure proposed by Representative

Byron of Maryland in H.R. 2936. It is our view that state and local fire service managers can most effectively provide for public safety without the limitations imposed by the FLSA, a piece of legislation which was originally enacted in the era of the Depression and applied to the private sector, and which was designed -- at least in part -- as a means of spreading employment.

If a complete overtime exemption for state and local fire fighters is not feasible, there are several alternative steps which would provide fire agencies with a substantial degree of relief. The first would be a measure which allows for the use of compensatory time off in lieu of paid overtime, and which permits the accumulation and use of such "comp time" over a length of time which extends beyond the immediate work period. In addition, we believe that Congress should increase the threshold number of hours which can be worked by a fire fighter before overtime hours are earned. As the members of this Subcommittee are aware, when first amended in 1974, the FLSA provided a 28-day, 240-hour standard work period for fire fighters. In succeeding years, the base period of working hours was reduced, in stages, to 232 hours, then to 216 hours, and finally, to 212 hours, based upon the survey conducted under the auspices of the Department of Labor.

It is significant to note that the 1975 survey conducted pursuant to the Fair Labor Standard Amendments of 1974 received responses from only 35 percent of the more than 6,000 state and local governments which employed five or more workers in fire protection functions. Nonsupervisory Fire Protection and Law Enforcement Employees in State and Local Government, U.S. Department of Labor (Employment Standards Administration, December 1979). It is also important to recognize that the results of the survey were largely influenced by the comparatively large numbers of fire fighters employed in fire agencies in the Northeast region of the country which responded to the survey. The statistics generated by the Labor Department and the Bureau of the Census clearly indicate a substantially lower number of hours worked by fire fighters in the Northeast, in particular contrast to fire protection employees working in the South and the West. The propriety of the 212-hour figure is made questionable by the weight given to the figures on average hours worked in the Northeast region, combined with the amount of nonresponse to the survey. That level of participation led the Labor Department to state that the study results should be used with caution. See Preface, DOL Study. Unfortunately, the application of the survey results on a nation-wide basis, as is currently anticipated, will have a substantial economic effect on fire departments outside the Northeast.

While it might be argued that in the ten years since the survey was conducted, there have been changes in the numbers of hours commonly worked by fire fighters across the country. The International Association of Fire Fighters, in its testimony before this Subcommittee in July, conceded that the most prevalent schedule for fire fighters is one which averages 56 work hours per week. Statement of Harold Schaitberger on behalf of the International Association of Fire Fighters, AFL-CIO, CLC (July 25, 1985), p. 9. A department maintaining such a schedule would be responsible for 12 hours of overtime liability for every fire fighter during each and every 28-day work period; such figures can obviously add up to very substantial figures on a city-wide basis. Certain union spokesmen have suggested that the real cost impact of this regular overtime liability will only represent a minor percentage increase in overall compensation. However, as budget-squeezed fire service managers across the country know well, the amount of discretionary funds available to pay such increased wage costs is even smaller or non-existent, particularly where such overtime costs have not been a part of budget and fiscal planning. In the words of one of our members, "While our city's anticipated two percent cost increase may not strike some as a great expense, what public safety function should we not perform, so that the Department can meet these unforeseen overtime expenses?" For these reasons,

we believe that the threshold number of hours worked by fire fighters before overtime compensation is due should be increased, at least to a level (224 hours in a 28-day period) which will accomodate the "most prevalent schedule" in fire agencies across the country, without triggering regular overtime liability.

Concerns about budgeting and planning lead to a further necessary measure: if fire fighters are to remain subject to the overtime provisions of the FLSA, Congress should restore the phase-in period initially envisioned by the 1974 Amendments. As is evident from the legislative history of that enactment, the adjustment period of nearly four years emerged from negotiations between the Senate and the House, see House Conference Report No. 93-953 (March 28, 1974), and was designed to accommodate the planning and budgeting needs of public employers through delayed implementation. In the event that a complete fire fighter's exemption from overtime requirements is not available, we strongly urge this Subcommittee and other Senators and Representatives to restore this phase-in period to avoid budget chaos, a tangled web of litigation and an undesirable reduction in the level of protective services.

Finally, we would reiterate the compelling need to provide relief for fire agencies which rely on the voluntary

efforts of employees and other members of the public. Communities across the nation depend every day upon the established network of volunteer fire fighters for their safety and protection. The application of the FLSA and its implementing regulations to such volunteer efforts threatens to disrupt these fire protection mechanisms, and unnecessarily interfere with the community-minded desire of professional and volunteer fire fighters to apply their skills to the protection of their communities.

V.

CONCLUSION

The Supreme Court's ruling in the Garcia case has effectively created a large and unanticipated increase in compensation costs for state and local fire services across the country. The immediate application of overtime standards to fire agencies, currently being contested in Federal court, subverts the clear intent of Congress in originally providing a phase-in period for FLSA coverage of fire protection employees. The statute's application to fire fighters in the economic climate presently faced by public employers is unwarranted and unwise, and its impact on established practices -- e.g., compen-

satory time off and traditional work schedules -- promises to be costly and disruptive. Further, the Labor Department's regulations will have the effect of limiting and disrupting the necessary efforts of fire protection volunteers in communities across the country.

The IAFC submits that the urgency of these issues demands prompt action by both houses of Congress to provide needed relief. We urge Senators and Representatives of both parties to investigate the fiscal problems facing governmental employers in their states and districts as the result of the Garcia ruling. We strongly support the approach taken in S. 1570, however, we emphasize the fact that some form of prompt relief is absolutely necessary for numerous fire agencies, and we urge the Congress to resolve these issues on a priority basis.

Senator NICKLES. Mr. Miller

Mr. MILLER. Thank you, Senator.

Very briefly, we are faced with the possibility of losing the services of salaried personnel who also act as volunteers in their off-duty hours. In our county, we estimate to lose 15 to 18 members through this regulation.

Senator NICKLES. Excuse me. Your home is where?

Mr. MILLER. Chesterfield County, VA, a suburb of the city of Richmond. It is located between Richmond and Petersburg, VA.

Anyway, we are going to lose these 15 to 18 active volunteers. Most of these people were volunteer fire fighters before they became career fire fighters. As a result, our county will have to find other alternative measures to replace their volunteer effort. We will either have to make new hires to replace these people; we may have volunteer engine companies which will be at lower manning levels during daytime and other low manning periods. If we have to make more re-hires, we may have to delay the opening of new and proposed fire stations.

We also have problems with administrative regulations, in that we will have some fire fighters who are volunteers in our county who are career people in other municipalities; they will not be able to respond with our department into the other municipalities under our mutual aid agreement.

The long and short of the thing is that we feel it to be unnecessary regulation and interference into our day-to-day operations, and it is going to adversely affect the volunteer operations in our local communities, which we feel is very representative of most of the volunteer and combination systems in the country.

Thank you.

Senator NICKLES. Thank you for your statement.

[The prepared statement of Mr. Miller follows:]

STATEMENT OF
FRANCIS A. MILLER
ON BEHALF OF THE
INTERNATIONAL ASSOCIATION OF
FIRE CHIEFS

MR. CHAIRMAN AND OTHER HONORABLE MEMBERS OF THE SENATE LABOR SUBCOMMITTEE

I AM FRANCIS A. MILLER OF MIDLOTHIAN, VIRGINIA. I PRESENTLY SERVE AS THE ASSISTANT DISTRICT CHIEF IN THE MIDLOTHIAN VOLUNTEER FIRE DEPARTMENT, WHICH IS A PART OF THE CHESTERFIELD FIRE DEPARTMENT IN CHESTERFIELD COUNTY, VIRGINIA, A MEDIUM SIZE VIRGINIA COUNTY, EXPERIENCING RAPID DEVELOPMENT, LOCATED BETWEEN RICHMOND AND PETERSBURG. I WISH TO BRIEFLY DESCRIBE THE IMPACT OF THE SUPREME COURT'S GARCIA RULING AND THE APPLICATION OF THE FAIR LABOR STANDARDS ACT TO VOLUNTEER FIRE AGENCIES AND TO COMBINATION FIRE DEPARTMENTS SUCH AS THAT OF CHESTERFIELD COUNTY, WHICH INCLUDES BOTH CAREER AND VOLUNTEER FIRE FIGHTERS. THE FIRE SERVICE IN OUR COUNTY OPERATES 14 STATIONS, INCLUDING 2 STATIONS STAFFED BY PROFESSIONAL, CAREER FIRE FIGHTERS, 3 STATIONS STAFFED SOLELY BY VOLUNTEER AND 9 STATIONS WHICH ARE STAFFED BY A COMBINATION OF PROFESSIONAL AND VOLUNTEER FIRE FIGHTERS. IT SHOULD BE NOTED THAT BOTH OUR CAREER AND VOLUNTEER FIRE FIGHTERS UNDERGO LENGTHY AND RIGOROUS TRAINING AND MEETS NATIONAL FIRE FIGHTER QUALIFICATION STANDARDS.

THE FIRE DISTRICT IN WHICH I SERVE IS ONE OF THE COMBINATION STATIONS, IN THAT THE COUNTY PROVIDES 9 CAREER FIRE FIGHTERS AND UTILIZES THE SERVICES OF 25 ACTIVE VOLUNTEERS. THREE CAREER FIRE FIGHTERS IN OUR STATION VOLUNTEER THEIR SERVICES TO FIRE DEPARTMENTS IN THEIR HOME COMMUNITIES, OUTSIDE OF OUR COUNTY. UNDER THE LABOR DEPARTMENT'S

REGULATIONS, THESE EMPLOYEES WOULD BE FORCED TO DISCONTINUE THEIR VOLUNTEER SERVICE, IF THEY RESIDED IN THE COUNTY. THIS IN FACT, IS THE CASE IN SEVERAL OF OUR OTHER STATIONS. SIMILARLY, ONE OF THE VOLUNTEERS IN OUR STATION IS EMPLOYED AS A CAREER FIRE FIGHTER AT ANOTHER STATION IN THE COUNTY. WE WILL SOON BE WITHOUT HIS SERVICES. IN ADDITION, ONE OF OUR OTHER VOLUNTEERS IS A CAREER FIRE FIGHTER IN A NEARBY CITY, A JURISDICTION WITH WHICH CHESTERFIELD COUNTY HAS A "MUTUAL AID" AGREEMENT. HE WILL BE UNABLE TO PROVIDE VOLUNTEER SERVICES IF OUR COUNTY IS CALLED TO A FIRE IN THAT CITY UNDER OUR MUTUAL AID AGREEMENT. SUCH RULES ARE COMPLEX AND UNNECESSARY, SINCE WE ARE DEALING WITH TRAINED FIRE FIGHTERS WHO WISH TO VOLUNTARILY SERVE THEIR COMMUNITIES; WORKER EXPLOITATION AND EMPLOYER COERCION TO GAIN UNCOMPENSATED OVERTIME IS, IN REALITY, NOT A PART OF THIS PICTURE. IN POINT OF FACT, MANY OF OUR CAREER PEOPLE ARE ENRAGED THAT THEIR VOLUNTEER SERVICE TO THE COUNTY WILL NO LONGER BE PERMITTED, AND THAT THEY ARE BEING TOLD HOW TO SPEND (OR NOT SPEND) THEIR SPARE TIME. ALL TOLD, WE EXPECT TO LOSE 15-18 VOLUNTEERS COUNTYWIDE AND HAVE SERIOUS RESTRICTIONS (DUE TO MUTUAL AID RULES) ON THE SERVICES OF SEVERAL OTHERS. SINCE RECRUITING AND TRAINING VOLUNTEERS TAKES TIME AND MONEY, AND IS NOT ALWAYS SUCCESSFUL, THE COUNTY MAY BE FORCED TO HIRE REPLACEMENTS, AT A MINIMUM ANNUAL COST OF \$25,000 PER MAN OR POSSIBLY REMOVE ENGINE COMPANIES FROM SERVICE OR DELAY THE BUILDING AND STAFFING OF PRESENTLY PLANNED NEW FIRE STATIONS.

OURS IS, OF COURSE, ONE SMALL EXAMPLE OF THE SEVERE PROBLEMS FACING THE FIRE DEPARTMENTS WHICH RELY ON THE ONE MILLION VOLUNTEER FIRE FIGHTERS ACROSS THIS COUNTRY, AND THE COMMUNITIES WHICH THEY SERVE. WE STRENUOUSLY URGE THIS SUBCOMMITTEE AND THE CONGRESS TO PROVIDE AN EXEMPTION FROM FLSA COVERAGE FOR FIRE PROTECTION VOLUNTEERS, TO AVOID THE HARSH CONSEQUENCES WHICH WE SEE UNDER THE FLSA PUBLIC BUDGETS AND FIRE PROTECTION ARRANGEMENTS.

Senator NICKLES. Mr. Roberts.

Mr. ROBERTS. Mr. Chairman and Senator Matsunaga, we are very grateful to you for the opportunity to appear today, and particularly from Mississippi, to say a very few words on behalf of law enforcement and in behalf of law enforcement in Mississippi.

I do not come to you as an expert. I have been commissioner of public safety there for about 20 months.

Senator Matsunaga, I was a prosecutor prior to becoming commissioner, so I am no expert. I probably have more questions than I do solutions or answers, unfortunately.

I have listened to the remarks made this morning. I probably could echo almost all of them. Mississippi, of course, is not a contract State. We do have to deal with what is, and what is right now is we have the *Garcia* decision that we must, in law enforcement administration, live with.

It has seriously affected law enforcement in my State; a lot of problems with it, principally, budgetary and financial.

Most of us in governmental organizations have no available funds with which to pay overtime. Our budgets are set in advance, as you know. Mississippi heretofore has had a State law which prohibited the payment of overtime to State employees. I realize, of course, that has been overruled with the decision, but that is something of the parameters we have had.

Even though in Mississippi, we have not had the legal or financial basis to prepare for this decision, I do not think any of us argue with the concept that these important public servants should be compensated commensurately with the actual time and risks of their hazardous professions—and certainly, law enforcement is one of the most difficult, demanding, overworked, and underpaid professions in society today. No one argues with that, I think.

My job as a law enforcement administrator is to merge the principle of this opinion and decision with the practicality of uninterrupted full public service to our constituents.

A large part of the adverse effects of *Garcia* is humanistic, as I view it. It has affected the day-to-day lives of our officers, their families, and their interaction with other agencies. Officers in our section have traditionally enjoyed some input into their work schedules, and I emphasize "some" input, with the resulting flexibility considerably boosting morale.

The rigidity of the *Garcia*-imposed schedules, while sound in principle and administratively efficient, have been tough on officer morale and his or her family life, no question about it. It is one of the biggest problems we see. These are human concerns which demand the sensitivity of all of us who are administrators. Special details, which our officers take great pride in—I have heard that mentioned this morning—but in our case, such things are our national championship pistol team; our honor guard; our football detail—all of these things have had to be severely curtailed. We can live with this. I am not saying we cannot. All of us in law enforcement can live with it if we have to. But it still has affected law enforcement, and those details are important to law enforcement as a profession, I think. Our people take great pride in them; I think most officers do.

We in law enforcement must utilize every resource we have to attract the best of both brawn and brain if we are going to do a good job in law enforcement. The impact of *Garcia* hits hard in a State like Mississippi where, unfortunately, many of our officers have to moonlight to make extra money to make ends meet.

My statement to you is a plea for relief in whatever form it comes from the Congress and the utilization of these resources, whatever we have, so that we might continue to attract qualified personnel rather than turn them away from law enforcement.

Law enforcement and firefighter personnel have the distinct responsibility and obligation of providing their individualized services to the public on an around-the-clock, 24-hour basis, 7 days a week, 365 days a year. Even though no real emergency may exist every hour of each day or night, these two professions must have sufficient, on-duty or on-call personnel to provide the public such protection as the public demands and must have.

Obviously, the nature of the services provided renders response time a critical factor. We in law enforcement refer to this as daily and routine activity, but it does not address the issues of time and manpower demands which are placed upon us when we are faced with emergencies or catastrophies as we were in Mississippi last week, when Hurricane Elena visited our gulf coast. Fortunately, at this time, we did not have to expend any overtime, any actual cash outlay. But yet, we were faced with rearranging schedules of officers and having extra officers work that area of the State, which meant we got minimal or no coverage in the other areas of the State.

In my budget request last week to the Mississippi Legislature, I requested \$1 million, which is not much money, I realize, to be used for overtime purposes for our people. In addition to that, I asked that our complement of State troopers be increased by 50 officers and 11 other personnel. What I am telling you is that \$1 million, as small as it is, is still a lot of money to a State like Mississippi, and 61 additional personnel, we think it would take that to put us back to where we were prior to *Garcia*, in terms of providing service to the public.

At one time, I thought it would be best to request that all of law enforcement be blanketly exempted from the *Garcia* decision. I have some mixed feelings about that. We all come from people who work, most of us. We have no problem or philosophical difficulty with paying people for what they do. I think that is as it should be.

I think possibly the better solution, and one that I recommend to you, is to address in law, perhaps, an amendment to the act which would deal specifically with such things as sleeping and mealtime compensation, as compensable hours of work.

The Department of Labor, I believe, has a regulation which has been interpreted as follows. When one is "engaged to wait", such is compensable time; while on the other hand, when one is "waiting to be engaged," such is not compensable time.

It sounds like something like a play on words. I think I understand it, and I think I agree with that. What I am telling you is we have to have some relief in the area of standby time, or on-call time. It is a little bit absurd to me to pay folks just simply for waiting, though I understand the philosophy of that.

I am getting ready to wind my comments up, and I know you are pleased about that.

We do not have the money in Mississippi to pay overtime. We cannot afford the loss of coverage entailed by the granting of a lot of compensatory time. Yet, in terms of making a request, the flexibility of the comp time is much easier to handle on a practical basis than is the raising of a lot of funds and moneys that none of us have.

It also seems to me, if the law could be amended to provide a maximum of at least 220 hours in a 28-day work period for law enforcement personnel, that might provide some relief to us.

Our choice, too, as I heard someone else say this morning, unfortunately, is reduced service to the public. My concern as an administrator is to be able to provide the very best, most cost-effective service I possibly can to the public. Law enforcement and firefighter personnel, too, provide a service that must be provided every single hour of every single day of the year. It is a philosophical question; what do we eliminate? None of the choices are good.

I am just asking you to grant us all the flexibility you can. Whatever you do, we will live with it and do the very best we can.

Thank you very much.

[The prepared statement of Mr. Roberts follows:]

COMMENTS TO BE MADE BY MISSISSIPPI'S
COMMISSIONER OF PUBLIC SAFETY,
JAMES L. ROBERTS, JR.,
TO THE UNITED STATES SENATE SUBCOMMITTEE
ON LABOR, WASHINGTON, D. C.
SEPTEMBER 10, 1985

The United States Supreme Court issued its opinion on February 19, 1985, in the case of Garcia vs. San Antonio Metropolitan Transit Authority, and petition for rehearing therein was denied on April 15, 1985. This decision, which applies the United States Fair Labor Standards Act to law enforcement and firefighter personnel, has seriously affected and created numerous problems, both budgetary and financial, for law enforcement officers and firefighters in Mississippi, as well as in all other states.

Most of us, especially in state-operated law enforcement agencies, have no available funds with which to pay overtime, since our budgets are set well in advance of the actual expenditures, and Mississippi has heretofore had state law prohibiting the payment of overtime to state employees. Accordingly, even though we have had neither the legal nor financial base to prepare for this decision, I think none of us argue with the concept that these most important public servants should be compensated commensurately with the actual time and risks of their hazardous professions. In law enforcement administration, then, we must merge the principle of the Court's well-reasoned opinion with the practicality of uninterrupted, full public service to our mutual constituents.

A large part of the adverse affect of Garcia is humanistic, because it has affected the day-to-day lives of our officers, their families, and all other law enforcement agencies. In the overworked and underpaid

law enforcement profession, officers have traditionally enjoyed some input into their work schedules, with the resulting flexibility considerably boosting morale. The rigidity of the Garcia-imposed schedules, while sound in principle and administratively efficient, have been tough on officer morale and on his or her family life. These are human concerns which demand the sensitivity of all of us who are administrators. Special details in which our officers take great pride, such as the Mississippi Highway Safety Patrol National Champion Pistol Team, and the Honor Guard, have had activities severely curtailed as a result of Garcia; other details have suffered likewise, and all these activities are important to law enforcement as a profession, and to the entire community we serve. We in law enforcement must utilize every resource in attracting the best of brawn and brain to law enforcement, and the impact of Garcia hits hard in a state like Mississippi, where many law enforcement officers are required to "moonlight" to make financial ends meet. We must have the assistance of Congress in the utilization of those resources, so that qualified personnel are attracted, rather than turned away from law enforcement or firefighting as viable lifetime careers.

As all of us know, law enforcement and firefighter personnel have the distinct responsibility and obligation of providing their individualized services to the public on an around-the-clock, 24-hour basis, seven days a week, 365 days a year. Even though no real emergency may exist every hour of each day or night, these two professions must have sufficient, on-duty or on-call personnel to provide the public such protection as the public demands and must have; obviously, however, the nature of the services provided renders response time a critical factor. We in law enforcement

refer to this as daily, routine activity but it does not even attempt to address the issues of time and manpower demands which are placed upon us when we are faced with major occurrences such as hurricanes, riots, tornadoes, or other disasters and catastrophes. Mississippi, like many other states, has a complement of approximately 369 troopers of the Mississippi Highway Safety Patrol assigned throughout its 82 counties with a total force of only 584 sworn officers from which to call into service in any given emergency situation. We have and we will continue to respond to emergencies, but, we are in dire need of your help and assistance in gaining some relief; hopefully the following suggestion will be of some benefit to you as you wrestle with this tremendous problem.

Although my first impression immediately following the Garcia decision seemed to dictate that the simple solution might be to blanketly exempt law enforcement officers and firefighters from the Fair Labor Standards Act, I certainly understand that this would create insurmountable problems for you and other members of Congress in attempting to get such an amendment enacted into law.

Possibly the better suggestion, and the one which I, hereby, respectfully, propose, is to specifically address, in law, a 7(k) exemption which already exists in an interpretation by the Department of Labor. The Department of Labor's interpretation of this exemption deals specifically with sleeping and/or mealtime as compensable hours of work and they have been interpreted as follows, to wit: when one is "engaged to wait," such is compensable time; while on the other hand, when one is "waiting to be engaged," such is not compensable time. I have no personal problems with this interpretation, and it is one with which I basically agree.

Hence, it would seem to me that if the Congress could amend the Fair Labor Standards Act whereby this simple issue could be addressed in detail, and allow by law a maximum of at least 220 hours in a 28-day work period for law enforcement personnel, and extend the time of implementation to such a point whereby the various state legislative bodies could address and provide for overtime payment in emergency situations, such might be the simplest solution to a major problem. I do believe this solution would be acceptable and equitable to all concerned in preference to the existing circumstances.

Senator NICKLES. Mr. Roberts, thank you.

Mr. SAUNDERS. Mr. Chairman and members of the subcommittee, I submitted a printed copy of my testimony, and I will do my best to distill it.

Senator NICKLES. Thank you.

Mr. SAUNDERS. My name is Roy Saunders. I am executive director of the centers of Tulsa. As such, I am responsible for managing several public assembly facilities located in Tulsa, OK.

I have been associated with the public facilities industry for the past 29 years. In addition, I am president—elect of the International Association of Auditorium Managers, IAAM, which represents over 1,000 public assembly managers throughout the United States. My testimony today is on behalf of IAAM.

Mr. Chairman, before I begin, I would like to thank you and the other subcommittee members for examining the impact of the *Garcia* decision upon State and local authorities and for this opportunity to testify regarding *Garcia*'s effect on public assembly facilities in the United States.

We feel that the *Garcia* decision, by requiring immediate compliance with the Fair Labor Standards Act, severely diminishes our ability in public facilities, particularly in the smaller markets, to provide necessary and desired services to the public at-large.

In the United States, virtually every city and university has at least one public assembly facility. There are over 1,000 such facilities located throughout the country. Most of these facilities, for one reason or another, do not qualify for the amusement or recreational establishment exemption from the Fair Labor Standards Act.

These facilities serve the community at-large by providing a forum for business and political conventions, trade shows and professional examinations. In addition, they have a wide variety of entertainment events, which appeal to almost every age group and social stratum. These events include: professional and amateur sports, jazz, classical, rock, and a variety of other entertainment and educational programs.

In 1984 alone, over 200 million people attended functions held in these public assembly facilities. I think that gives you an idea of what we represent.

Our event staffing requirements, for example, 50 percent of an event's costs are personnel costs. Under *Garcia* public employees who moonlight for a public facility may be entitled to overtime, even though they are essentially working a second job for another employer. Facilities no longer can grant comp time to full-time staff for overtime hours worked during peak period. And, as has been mentioned earlier today, many of our employees want the ability to bank the overtime, and take it off during the off-peak period.

As far as the entertainment and educational facility business, we experience a number of peaks and valleys, and this is critical to our staff as well as to the management functions.

The effect of *Garcia* on our industry. Increased salary costs will either diminish the number and types of events, or require increased Government subsidies at the local level. It will reduce the ability of small markets and facilities to attract big name entertainment. As the costs go up—and our labor costs being over 50

percent—this impacts our ability to book and schedule major entertainment in these smaller markets.

Garcia may result in higher ticket prices. Attendance by the less affluent will be reduced. Facilities will no longer use highly trained public, police and fire personnel, but rather, we may have to opt to hire our own staffs and take the time to train those without the training capability of the established police and fire departments as they exist.

Garcia will hurt our employees by one public employees may lose their second jobs with our facilities; two part-time employees will be hurt by a cutback in events, and three lose flexibility to take the comp time during nonpeak seasons.

Quickly, and in conclusion, because of the effects, IAAM supports legislation which corrects *Garcia's* impact, such as the bill introduced by Senator Nickles.

I thank you on behalf of the International Association of Auditorium Managers.

Senator NICKLES. Thank you, Mr. Saunders.

[The prepared statement of Mr. Saunders follows:]

TESTIMONY OF

ROY G. SAUNDERS
EXECUTIVE DIRECTOR
THE CENTERS OF TULSA

ON BEHALF OF
THE INTERNATIONAL ASSOCIATION
OF AUDITORIUM MANAGERS

BEFORE THE
SUBCOMMITTEE ON LABOR
LABOR AND HUMAN RESOURCES COMMITTEE
UNITED STATES SENATE
WASHINGTON, D.C.

SEPTEMBER 10, 1985

Mr. Chairman and members of the Subcommittee:

I. INTRODUCTION

Good morning. My name is Roy G. Saunders. I am Executive Director of the Centers of Tulsa. As such, I am responsible for managing several public assembly facilities located in Tulsa, Oklahoma, including a 9,000 seat sports arena, an exhibit hall, a conference center and a performing arts center. I have been associated with the public facilities industry for the past twenty-nine years. In addition, I am the President-elect of the International Association of Auditorium Managers (IAAM), which represents over 1000 public assembly managers throughout the United States. My testimony today is on behalf of IAAM.

Mr. Chairman, before I begin, I would like to thank you and the other Subcommittee members for examining the impact of the Garcia decision upon state and local authorities and for this opportunity to testify regarding Garcia's effect on public assembly facilities in the United States. Because we play an important and unique function within our respective local communities, we believe it is essential that Congress understand how Garcia impacts our industry and the people we serve.

In a nutshell, we feel that the Garcia decision, by requiring immediate compliance with the Fair Labor Standards Act, severely diminishes our ability as public facilities, particularly in the smaller markets, to provide necessary and desired services to the public at large. To explain that belief, my testimony will first examine the nature of the public facility

industry -- the public we serve, the events we house, the workers we employ, and the types of facilities we use. I then will explain why, in light of that nature, the Garcia decision adversely affects our service to the public. Finally, it must be noted that many of the examples contained in my testimony are drawn upon my own situation in Tulsa. However, based on my substantial experience in the industry and numerous conversations with my colleagues, I can assure you that the same principles and problems are applicable to other arenas in other jurisdictions.

II. THE NATURE OF THE PUBLIC FACILITIES INDUSTRY

a. In General

In the United States, virtually every city and university has at least one public assembly facility. In fact, there are over 1,000 such facilities located throughout the country. These arenas range from a seating capacity of approximately 300 to over 100,000 and include performing arts theatres, outdoor pavilions, convention centers, civic centers, sports arenas and indoor and outdoor stadiums. Most of these facilities, for one reason or another, do not qualify for the amusement or recreational establishment exemption from the Fair Labor Standards Act.

During a given year, these facilities serve the community at large by providing a forum for business and political conventions, trade shows and professional examinations. In addition, they house a wide variety of entertainment events, which appeal to almost every age group and social stratum. These events include:

professional and amateur sporting events; jazz, classical, rock and country music concerts; and such forms of family entertainment as circuses, fairs, plays, musicals and novelty acts like the Harlem Globetrotters. In 1984 alone, over 200 million people attended functions held in public assembly facilities; and with most of these arenas located in urban areas, the attendance at these events provides downtown businesses with significant and needed customer traffic.

b. Event Staffing Requirements

Mr. Chairman, as I am sure you and the Subcommittee members are aware, the crux of the Garcia issue with respect to our industry is its impact on how we staff our events. The staffing of public facility functions differs, depending upon the kind of event, the nature of the anticipated audience, and the type of arena. In order to understand the full impact of Garcia on public facilities, however, several common characteristics of the personnel operations in our industry must be explained.

First, personnel costs are the largest component of a facility's annual operating budget, usually running about 50 percent of total annual expenses. Thus, any proportional increase in such costs caused by requiring overtime payments to all employees would have a severe adverse effect on an auditorium's annual budget.

Second, to provide ushers, ticket-takers, security, fire, health and clean-up personnel, virtually every public assembly facility in the country hires off-duty public employees in a part-time capacity. For example, in Tulsa, we often use municipal

police officers and firefighters who want to supplement their income by working our events during their off-duty hours. Before the Supreme Court's decision in Garcia, such employees were properly treated as working a second job and thus were paid straight time for the hours they worked for a facility. In contrast, under Garcia, auditorium managers may have to pay such employees time and a half, because the employee's two jobs are treated as work undertaken for the same employer -- the municipal authority. In other words, a public employee who works for a municipally-run facility on a moonlighting basis may be entitled to overtime, even though he is essentially working a second job for another employer -- albeit a public one. In contrast, an employee who works two jobs for two private employers is not entitled to overtime under the Fair Labor Standards Act.

Finally, all arenas have full-time staff, composed of both exempt and non-exempt employees. Due to the seasonal and unpredictable nature of the entertainment and auditorium business, these employees work long hours during certain peak periods of activity. In general, prior to Garcia, these employees were granted compensatory time off for overtime hours worked, which they could take advantage of during the arena's non-peak season. In fact, many of these employees originally chose to work in our industry so that they would have the ability to take additional time off rather than receive overtime pay for hours worked.

III. EFFECT OF THE GARCIA DECISION ON THE AUDITORIUM INDUSTRY

In light of the staffing needs of public facilities discussed above, the Garcia decision concerns us for several reasons, including those listed below:

a. Increased Operating Deficit

Many public assembly facilities, including my own in Tulsa, operate at a deficit in an effort to provide the community with desired entertainment and other necessary functions. Salary costs are already substantial. Any increase in such costs resulting from Garcia may diminish our capacity to serve the public's needs properly by limiting both the number and the type of functions we can offer. Alternatively, the Supreme Court's decision will require increases in the subsidies we receive from our respective authorities, during a time when such budget increases are almost impossible to secure.

b. Inability to Provide Desired Entertainment and Services

Any increased costs resulting from Garcia will substantially hinder most facilities' ability to attract "big name" entertainment. Instead of playing the smaller markets or arenas with limited seating capacity, these performers will decrease the number of dates they perform and play in only the largest arenas in the "major" markets. For example, in Tulsa, we recently booked Tina Turner for a concert in our arena later this year. Because of the Garcia decision, it is doubtful that such an act will perform in Tulsa in the years to come, because the "Garcia" costs diminish the share of net receipts which can be offered to the performer.

c. Higher Ticket Prices

To the extent possible, another method by which facilities will attempt to reduce the impact of Garcia is to raise ticket prices. This step, however, will likely limit our events to more affluent individuals with large amounts of disposable income. Moreover, it is doubtful that ticket prices for family entertainment events can be raised sufficiently to cover our increased costs resulting from Garcia, without severely reducing the demand for such events. To summarize, if ticket prices are increased to meet the increased costs resulting from the Garcia decision, attendance at events by people of moderate means will be reduced, as will the provision of family-type entertainment events. This would be a failure of our public function.

d. Detrimental Effect on Security

In addition to raising operating deficits, cutting back on levels of entertainment, and increasing ticket prices, many public facilities may avoid using highly-trained public police and fire personnel, if required to pay these employees overtime for the hours they work in their part-time capacity. Instead, they will hire, train and use their own security and safety personnel, who at least initially will not be as highly skilled and experienced as city, county, or state policemen and firefighters.

e. Adverse Impact on Current Employees

Finally, we believe the Garcia decision will harm our employees in at least three ways. First, to avoid the costs attendant upon Garcia, many facilities will not use employees who hold another

job with a public agency. As a result, many long-time employees will lose their "second" jobs with our facilities. Second, any cutback in the number of events caused by Garcia will necessarily reduce the work opportunities for all our part-time employees. Finally, because regulations under the Fair Labor Standards Act require that compensatory time-off be used within the same pay period as it is earned, our employees will no longer have the flexibility of taking compensatory time-off during our non-peak seasons for their hours of overtime worked.

IV. CONCLUSION

Mr. Chairman, as a result of the effects I have discussed, we feel that the Garcia decision significantly hinders our ability to properly serve our public function of providing a forum for activity and of bringing entertainment to our respective communities. Consequently, we are pleased that legislation has already been offered in both the House and the Senate that would remedy the harmful effects of Garcia on our industry and the people we serve. For example, we believe that the bill you have introduced, S. 1570, offers us the type of relief we are seeking -- that is, an exemption for public assembly facilities from the overtime requirements of the Fair Labor Standards Act. We hope that you and the other members of the Subcommittee will make every effort to ensure that your bill or similar legislation is enacted.

Mr. Chairman, on behalf of IAAM, it has been a pleasure to testify today. Once again, thank you for this opportunity to bring to light the effect of Garcia on public assembly facilities. I would be happy to answer any questions that you or the other Subcommittee members may have for me regarding this issue.

Senator NICKLES. I have a few questions for each of our panelists.

Mr. Saunders, as I understand it, many of your employees would also be working this as a second job.

Mr. SAUNDERS. Yes, sir. In our situation, we utilize off-duty police officers, off-duty firemen, city clerks or other city personnel, as well as a variety of other part time-people.

Senator NICKLES. Under the *Garcia* decision, would a city employee who had already worked a regular 40-hour week in the city clerk's office and then work with you on a weekend or 3-day period when you are having a show be mandated to be paid time and a half of their previous or base salary on their regular job? Therefore, that would prohibit them from working for you altogether, even though they want to work with you?

Mr. SAUNDERS. Yes, sir. We feel this creates an unfair burden on our promoters or producers of events and activities, utilizing our facility, because the first hour of the employee's time that we utilize is at time and a half because of his other employment with the municipality.

Senator NICKLES. What would your average wage rate be?

Mr. SAUNDERS. I do not really have that figure handy. At straight time, probably in the neighborhood of \$10.

Senator NICKLES. \$10 now.

Mr. SAUNDERS. Yes, sir.

Senator NICKLES. Thank you.

Mr. Roberts, I have heard from other commissioners of public safety, who have indicated that the *Garcia* decision is a real burden. I can recall of a case in Oklahoma, where we recently had a couple of people escape from the jail. They were involved in a manhunt. The manhunt took something like 24 or 48 hours. Those individuals who were involved worked around the clock, and I do not know if they had any time off. My guess is that those counties, or the State, or whoever was involved, would be giving them a couple of days off to compensate them for their work.

Is that the way Mississippi would handle something like that?

Mr. ROBERTS. Heretofore, it is certainly the way we would have handled it. And today, Hurricane Elena is a prime example, if you can relate that to a manhunt. We had about 60 or so extra officers down on the gulf coast, working around the clock, and we had to juggle those schedules very artfully to avoid the payment of overtime.

Senator NICKLES. You are to be commended if you can do it. I would think it would be a difficult thing to do.

Chief Stewart and Mr. Miller, you both brought out a point that is very important. You stated that fires do not stop at 5 o'clock?

Chief STEWART. No, they do not.

Senator NICKLES. You also mentioned the administration, scheduling and the burden. You mentioned in your home town of Hartford, CT, that this would not be that big a burden to you, but possibly in other areas of the State, where comp time is more prevalent it would be. Am I paraphrasing that right? Do you use comp time in Hartford?

Chief STEWART. No, we do not, no. It would, in fact, be a similarity with our civic center. When the performers come in, when we send firefighters over there, and we pay straight time, and we bill

the promoter. What it would mean under *Garcia* is that we would have to pay time and a half and bill the promoter. And that means the promoter's costs are going to go up, the cost of the show. That is how we would be impacted. Everything that we do beyond the normal, 42-hour work week—we are very fortunate in the Northeast, that we come under that. But on the whole, if you look at the entire fire service throughout the country, with an average of 56 hours, and personnel being 91 to 92 percent of a budget, these figures are not overdramatized as some people have indicated. They are actual, and you can see the dramatic increase that would occur.

Senator NICKLES. Thank you.

Let us take the example of the volunteer department, because I have heard this case time and time again. I am not sure that it has been made before this committee as well as you are making the comment.

Mr. Miller, your home county is Chesterfield, VA. You have an agreement between, say, the county fire department and maybe some of the cities where they would reciprocate and help each other in the event of a substantial fire?

Mr. MILLER. That is correct. We have a mutual aid agreement with all the surrounding communities, either cities or counties. And it works both ways, that if we need their assistance, they come into our jurisdiction; if they require ours, we go to theirs. We, in essence, dissolve boundary lines in extraordinary circumstances for fire protection.

Senator NICKLES. You are able to pool equipment and personnel to respond to whatever situation would arise?

Mr. MILLER. Exactly.

Senator NICKLES. You would do that right now. With that time allotment, 28 days and x number of hours and so on you have the flexibility within yourselves to work extra time and maybe take comp time as an option?

Mr. MILLER. No; we have a combination fire department, Senator. We have career firefighters and volunteer firefighters. If we have in our fire department a volunteer firefighter who is a career firefighter in another jurisdiction, that individual will not be able to respond with us into his municipality where he is an employee. He will not be able to go with Chesterfield units into the adjoining city as a volunteer from Chesterfield, because when he does that, that city where he is an employee would have to pay him overtime, although he would be responding in his spare or off-duty time.

Senator NICKLES. Basically what you are saying is that with *Garcia*, his primary city would have to pay him the time and a half, and they are going to say, "Hey, we cannot do that," and then he no longer would be able to respond.

Mr. MILLER. With our units into their jurisdiction. That is a fairly minor problem. Our major problem is that we have, as I said, a combination system; we have about 200 career firefighters and about 350 volunteer firefighters. Some of these people play dual roles. They work in one fire station, they volunteer in their home community. Those people, we will lose as volunteers in their home community, because if they responded on a call during the 28-day cycle, whatever their activities were would be considered as over-

time. And the county has interpreted the regulations to mean that we cannot pay that overtime.

Senator NICKLES. You cannot pay it, so they do not get it, and the city loses that service—which is probably as important as anything else.

Mr. MILLER. Yes. Our county has made the determination that you cannot be a career person and a volunteer at the same time. So we are losing 15 to 18 volunteer people within our county.

I would like to point out that this does not have anything to do with coercion or forcing people to work uncompensated overtime; that it is strictly people doing what they want to do in their spare time, and under these regulations, they are no longer allowed to do it.

Most of these career firefighters were volunteers before they became career personnel and have chosen to continue their volunteer activities, which we are now losing.

If you will indulge me for a second. I spoke with a friend of mine in the western part of the State yesterday, Roanoke County, VA, where they have a combination system. In one volunteer department, they have 44 active members. Out of those 44 active members, they will lose 11 of those 44 because they are also career members in that same county. And that is only one station in a county that probably has eight or nine fire stations. They are losing 25 percent of their active volunteer force out of one company.

Senator NICKLES. Right now as volunteers they are compensated just by that call; is that correct?

Mr. MILLER. In our situation, the county gives our volunteers \$1 per call. It is an expense reimbursement. It is not considered compensation. It is to get your clothes cleaned and pay for gasoline going to the fire station.

The *Garcia* ruling will have an effect in that our board of supervisors will be afraid to up the expense reimbursement per call, because we may then become classified as employees. On a State level in Virginia, there are Senate hearings going on to establish a pension plan for volunteer firefighters. This may have some effect upon that, and we would end up denying the pension plan for long-term volunteers.

Senator NICKLES. So whatever stipend or pension or anything else that a county, city or State has would probably be enough to trigger the definition of an employee, which I think deals with something like \$2.50. If you are over that amount, then you would be classified as an employee and you would have to be paid time and a half whatever their base was.

Mr. MILLER. That is right. Or they would be eliminated as volunteer workers.

Senator NICKLES. Or they would be denied that opportunity.

Mr. MILLER. Yes; they would be eliminated from volunteer organizations and some other arrangement made.

Senator NICKLES. That is very similar to the other story I mentioned concerning the secretary and the busdriver, and also what we heard from the police department where they were doing some contract work.

Thank you for coming.

Senator Matsunaga.

Senator MATSUNAGA. Thank you, Mr. Chairman.

May I, for the record, include the letter from Gov. Lamar Alexander, chairman of the National Governors' Association, dated August 30, 1985?

Senator NICKLES. Certainly. We would be happy to have that included in the record.

[The letter referred to follows:]



National Governors' Association

1985 SEP -3 PM 2: 14

Lamar Alexander
Governor of Tennessee
Chairman

Raymond C. Scheppach
Executive Director

August 30, 1985

The Honorable Spark M. Matsunaga
United States Senate
109 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Matsunaga:

In July, Governors Ashcroft, Lamm and Martin testified before your subcommittee concerning the impact of the Supreme Court decision in the Garcia case. They emphasized the impact of the decision on state and local governments and their employees. They urged the Subcommittee to consider and enact corrective legislation.

At that time, the National Governors' Association had not yet taken a position on the Garcia decision. However, when the Association met in Boise early this month, the Governors adopted a new policy position which calls on the Congress to consider four specific legislative recommendations:

- o allow state and local governments the flexibility to offer employees compensatory time off in lieu of overtime pay;
- o make the provisions of the court decision applicable to public employees on a specific future date so that states and localities may make the fiscal, contractual and statutory changes necessary to come into compliance;
- o provide that states and localities are immune from liability incurred between the effective date of the Garcia decision and that specific future date, unless states or localities refuse to make a good-faith effort to comply with FLSA during the interim period; and
- o clarify the definition of volunteers so that groups such as volunteer firemen would not be brought under the provisions of the Act.

The Honorable Spark M. Matsunaga
Page Two
August 30, 1985

It is important to note that the resolution makes clear that the Governors seek only limited changes in the Fair Labor Standards Act. We are not seeking to change the status of employees covered prior to the Garcia decision. Instead, our position reflects our strong belief that the states and localities must be given the same flexibility in dealing with their employment requirements as is the federal government. We believe strongly that this issue should be addressed separately from any other changes that may be under consideration in that Act.

On behalf of the Governors, I would urge you to act promptly to report out corrective legislation as quickly as possible. Without early action there cannot help but be substantial disruption for governments and our employees as well.

We appreciate your leadership on this difficult issue. We would be pleased to work with you and your staff if you have any questions or if we can be of other assistance as you develop this required legislation.

Thank you for your consideration.

Sincerely,

Lamar Alexander

Governor Lamar Alexander
Chairman

cc: Subcommittee on Labor

Senator MATSUNAGA. And, because of the limitation of time—and I am already overdue, just as you are, at another meeting—just one personal note here.

I am glad to have Mr. Roberts here from Mississippi, because one of my daughters just became a resident of your State, over in Iuka, MS.

Do you happen to know a Dr. Kelly Scott-Seger?

Mr. ROBERTS. Senator, I know the family, and I know Iuka and Tishamingo County well. It is about 50 miles from my hometown.

We were delighted and honored to have you in Mississippi, and you have a standing and special invitation to visit there any time.

Senator MATSUNAGA. Well, I am certainly glad that, since my daughter is there now, you at least pronounced my name correctly—unlike the chief from Connecticut. [Laughter.]

I was very much impressed with the efficient police system in Iuka, MS. As a matter of fact, I saw no police officers there. [Laughter.]

Senator NICKLES. You may want to get a commitment that you will not get a parking or speeding ticket when you go through Mississippi.

To all of our panelists, I appreciate your comments.

We will keep the record open for a short period of time for your response to any questions that may come to myself or other members of the committee.

Senator MATSUNAGA. And I join the chairman in thanking you for being here, all of you.

[Additional material supplied for the record follows:]

September 10, 1985

Statement of Edward I. Koch
Mayor of the City of New York
Before the Senate
Committee On Labor and Human Resources
Subcommittee on Labor

I appreciate your invitation to submit views concerning the effect of the Fair Labor Standards Act on New York City as mandated by the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority decided February 19, 1985.

With your permission, I will comment on the history of the Act, its impact, and the necessity for amendments exempting state and local governments from the overtime provisions of the Fair Labor Standards Act. I am not seeking an exemption from the minimum wage provisions. S.1570, introduced by Senators Nickles and Wilson, accomplishes that purpose and also eliminates the potential retroactivity created by the Supreme Court's sudden reversal. Therefore, I am endorsing that bill.

History

New York City and other state and local governments were first made subject to the minimum wage and overtime pay provisions of the Fair Labor Standards Act by the 1966 Amendments which became effective February 1, 1967. These Amendments included under the Act's jurisdiction all employees engaged in the operation of hospitals, residential care facilities, schools; and mass transit. The Fair Labor Standards Act was again amended effective June 30,

1972 to extend coverage under the Act to employees of public and private preschools.

Effective May 1, 1974, the Fair Labor Standards Act was again amended to extend its provisions to all remaining state and local government employees not previously covered. The Supreme Court, on June 24, 1976 in National League of Cities v. Usery, held that Congress acted unconstitutionally in extending FLSA to the integral operations of the states and political subdivisions in areas of "traditional governmental functions". The Court established a distinction between traditional and nontraditional governmental functions permitting coverage under the Act for employees engaged in activities of a nontraditional governmental nature.

In Garcia v. San Antonio Metropolitan Transit Authority, the Supreme Court took another look at the application of the FLSA to state and local governments. At issue in Garcia was whether a San Antonio bus driver was due overtime under the Fair Labor Standards Act. After hearing argument on the aforementioned question, the Supreme Court ordered additional argument to determine if National League of Cities should be reconsidered. On February 19, 1985, the Supreme Court overruled National League of Cities and held:

"The attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental functions' is not only unworkable but is inconsistent with established principles of federalism and, indeed, with those very federalism principles on which National League of Cities purported to rest", and

"There is nothing in the overtime and minimum wage requirements of the PLSA, as applied to SAMTA, that is destructive of state sovereignty or violative of any constitutional provision".

Garcia was decided by a 5 to 4 vote; the strong dissents conclude that the overruling of National League of Cities substantationally alters the Federal system embodied in the Constitution.

After the Supreme Court denied reconsideration of Garcia on April 15, 1985, the states and cities are mandated to comply with the Fair Labor Standards Act and the resultant adverse economic impact on state and local government without concurrent federal aid. (See Footnote 21 in majority opinion and footnote 7 in J. Powell's dissent) The budgetary impact in New York City alone is estimated to be \$42 million per year without taking into account any potential retroactive impact. Compliance in other jurisdictions will have at least a proportionate, if not greater, budgetary impact. States and cities are also left with the Court's clear suggestion directing them to Congress for an exemption from the PLSA.

Effect & Impact

In New York City alone, under our present personnel practices, the budgetary cost of complying with the Act is estimated to be 40 million dollars per year.

This estimate does not include the enormous cost of re-evaluating our present personnel practices to bring them into complete compliance with the FLSA. It also does not include the continuing recordkeeping burden imposed by the FLSA. Nor does it include any claims for retroactivity. We have already been sued for retroactive payment by a former employee who left City service six months prior to the Garcia decision. New York City has over 250,000 employees working in over 5,000 civil service job classifications. The administrative costs in time and manpower for determining which of these job classifications are exempt from the Act, and implementing and monitoring policies for nonexempt personnel, cannot be fully predicted. A Mayoral task force has identified, among others, two major areas of concern:

1. overtime compensation in general
2. Section 207K maximum hours of work for police (correction) and fire employees

1. Overtime Compensation: Section 207 of the Act basically requires that overtime be paid only in cash. Since 1967, New York State and New York City have been governed by state [New York State Fair Employment Act (Taylor Law)] and local [New York City Collective Bargaining Law] laws that require collective bargaining with certified employee organizations.

The Agreements reached with those Unions representing non-uniformed employees provide an employee with compensatory time as compensation when overtime is performed under certain specified conditions. The Agreements reached with those Unions representing certain uniformed employees (police and corrections), for the most part, provide an employee with an option to select compensatory time or cash as compensation when overtime is performed. Public sector employees are not ecstatic about the implications of applying the Act. Many have expressed their concerns about losing collectively bargaining benefits such as their ability to earn and take compensatory time and also about seeing a reduction in their take home pay as overtime controls are instituted for budgetary reasons. With the elimination of compensatory time payment or the option of payment by compensatory time for overtime work, the City faces the distressing problem of disbursing millions of dollars in unforeseen wages and pension costs which were neither contemplated in its budget process or for that matter during collective bargaining negotiations with the relevant unions. This budgetary burden is doubly painful coming as it does on the heels of massive cutbacks in federal assistance to the nation's cities along with the proposal to abolish the state and local income tax deduction on individual federal tax returns. The City will be faced with decreasing revenue, spiraling personnel costs and substantial limitations on its ability to tax to raise revenue. The net result can only be a cutback in services to the citizenry of our City.

2. Maximum Hours-Police etc. Section 207K of the FLSA provides a partial overtime exemption for police, correction and fire employees. It permits the totaling of hours actually worked between 7 and 28 calendar days when determining if overtime is due under the act.

Cash compensated overtime has enormous pension implications. If the City is required to pay overtime to police and other law enforcement personnel, the compensation in the twelve months prior to retirement will increase in some cases substantially. This will in turn cause the employees' annual pension to increase. For example, for each \$1,000 paid to a police officer in overtime compensation in his last twelve months worked, the police officer's pension will be increased by \$500 per year for the rest of his life.

A 1975 Court ordered survey of hours worked by certain uniformed employees resulted in the Section 207K exception that permits a maximum of 171 hours for police and correction and 212 hours for fire employees in a 28 day period without overtime compensation. We were never surveyed and we question the extensiveness and findings of that survey because the employees in so many jurisdictions work a greater number of hours than the 171 and 212. New York City, as well as other cities and states, never participated in the legal or administrative review of the aforementioned limitation on hours worked by uniformed employees as the FLSA did not apply to local and state governments under the holding of National League of Cities v. Usery.

Finally, the present number of maximum hours (171 hours) for police, correction, and (212 hours) for fire employees appears to be insufficient. My staff is currently conducting a survey to determine the average number of hours performed by these emergency services in a 28 calendar day period. Once this information is gathered and analyzed we will request a review by the Department of Labor of the maximum hours permitted under Section 207K of the Act.

In New York, "hours of work" is, and always has been, a mandatory subject of collective bargaining. The public sector in New York is highly unionized and has been for over two decades. Strict federal regulation will at this late date be disruptive of the mature relationships that have developed. This is true in other jurisdictions subject to collective bargaining. If the FLSA is not amended to provide either a total exemption for state and local governments or an exemption from the overtime provisions, the cost of union contracts will increase without providing the city and other state and local governments with the opportunity to achieve a concomitant benefit through the negotiation process.

This is particularly a problem for our mass transit system in New York City, where the unions have bargained for and achieved a set of detailed and complicated compensation arrangements, which were negotiated without reference to the framework of the FLSA. Applying the Act to these contracts would result in enormous

additional expense for administrative and overtime costs. Chairman Kiley of the Metropolitan Transportation Authority is submitting a statement to this Committee outlining the special concerns of mass transit and the serious burden the Act's requirements could impose on the New York mass transit network.

Amendments

New York City supports S.1570 which exempts state and local governments from the FLSA (but not from the minimum wage provisions) and eliminates potential retroactive liability under the Act. These amendments will have the effect of restoring the status quo regarding the application of the FLSA that was in effect under National League of Cities v. Usery. Additionally these amendments will place in the proper perspective the longstanding balance between states' rights and federal authority. Further these proposed amendments would attempt to eliminate retroactive liability for cities and states as was done for the private sector with the enactment of the Portal to Portal Act and permit compensatory time when overtime is performed.

Unforeseen overtime costs totaling at least in the hundreds of millions and probably the billions will hamper states and localities from enhancing services, especially at a time when

federal aid to state and local governments is being cut back. This, certainly, is not a result intended by the creators of the Fair Labor Standards Act. In order for state and local governments to function, immediate legislative relief is need. The Nickles/Wilson bill (S.1570) offers the necessary relief. Therefore, I am supporting this bill. I seek your support of that amendment to the Fair Labor Standards Act to remedy these significant problems.

Thank you.

A handwritten signature in dark ink, appearing to read "Ed Koch", written over the printed name.

EDWARD I. KOCH

0432L

TESTIMONY OF HAROLD WASHINGTON
BEFORE SENATE LABOR SUBCOMMITTEE

September 10, 1985

Mr. Chairman (Senator Nickles) and members of this Subcommittee, I am Harold Washington, Mayor of The City of Chicago. I am grateful for the opportunity to address you today concerning the impact of the recent Supreme Court decision in the Garcia case upon one of this nation's foremost cities.

When it enacted the FLSA 47 years ago, in an era of industrial sweatshops and struggling unionism, Congress sought to eliminate exploitation of employees by establishing a minimum wage and ensuring equitable compensation for extended workweeks. I want to preface my remarks today by stating that I support these historic and progressive goals of the Fair Labor Standards Act. The City of Chicago is a fair employer. It does not exploit its employees. All City employees are paid more than the minimum wage, the vast majority are paid much more than the minimum, and extended hours are well compensated.

In addition, key sectors of our labor force are unionized, and the unions vigorously assert the employees' interests within a statutory framework highly protective of collective bargaining rights. We currently have collective bargaining contracts covering several large groups of employees. Anyone who surveys these agreements would conclude that the City's workers are fairly compensated.

I come here today, however, to express my concern about the impact of a wholesale and indiscriminate extension of the inflexible overtime provisions of the Fair Labor Standards Act to municipal employees.

The services which our City must provide for its citizens simply do not obey the schedule imposed by a forty-hour week or any of the narrow exceptions provided in the Act. Many municipal services -- police protection, for example -- must be provided twenty-four hours a day, seven days a week, and sometimes by the same individuals on a continuous basis.

A police detective cannot go off duty at a critical juncture in a murder investigation. Other City services must be available on a round-the-clock basis when the need arises, such as in a natural disaster, weather or health emergency. Still other services, such as family crisis intervention and data and personnel support services, must be provided on call and for as long as the urgency exists.

All of these necessities are simply a result of the unique type of employer a city like Chicago is. We don't turn out a product on the basis of a predictable demand. Nor are we driven by a profit motive. And we do not compete in the marketplace. Instead, we are an employer who is responsible for the public health and safety of 3 million citizens and more than a half million workers and visitors daily. We are accountable not only for how well we do that job, but also for how we spend the taxpayers' money to provide these services.

Chicago, like most other cities, has traditionally met the problem of these predictably unpredictable demands

for essential services, and the resulting need for flexible scheduling, by various compensatory time-off systems. Employees who must work extra hours may "bank" them and take the hours off at some later time. This approach has balanced the needs of all three concerned parties. The citizens receive the services they require when they need them. The City can budget and plan to meet unexpected and varying needs without vastly expanded and unpredictable demands on its budget. And employees often prefer to receive their compensation for overtime in leisure time rather than in money. Even for those employees who do not prefer "comp time," time off with pay is often useful during family emergencies or extended illness -- an unanticipated fringe benefit which allows them to maintain health and other insurance coverage during such times.

As the spokesperson for the Service Employees International Union has already testified to this Committee on July 25, about 40% of the SEIU members elect in their

contracts to be paid in time rather than money for extra hours they work. Municipal employees in Chicago appear to have a strong preference for comp time. For example, we have collective bargaining contracts with our police officers and nurses. Nurses who work for the City have agreed to be paid in compensatory time off for all hours worked in excess of 7 per day or 35 per week. The police contract provides that an officer shall have the option of electing between comp time and monetary compensation for overtime hours worked, and approximately 50% of police officers have opted for comp time.

I have long championed the rights of public employees to determine the conditions of their employment through collective bargaining. This has been my position long before public employees were allowed to unionize and bargain in the State of Illinois. So long as there are employees in Chicago who want to have the option of compensation in time rather

than in money, I believe that this should be a subject left to the collective bargaining process. Three different choices have resulted from the bargaining process in Chicago -- the nurses' contract provides for comp time only, the firefighters have opted for monetary compensation for overtime, and our police officers have negotiated for the freedom to choose between the two in the individual instance. Those contracts represent compromises of the interests of both the City and its employees. By removing this subject from the collective bargaining process, extension of the Fair Labor Standards Act to municipalities will seriously interfere with the collective bargaining rights of public sector employers and employees.

Moreover, because comp time is the most typical overtime provision for City employees who do not belong to unions, many more changes will be necessary to bring the City into compliance with the FLSA. Our Budget Director has estimated that the cost of the additional cash overtime for City employees

will exceed \$13.5 million for the period from April 15 to December 31 of this year alone, and that the additional record keeping and administrative costs of full compliance will be \$500,000 each year. If the City is compelled to "cash out" the number of hours employees have accumulated thus far, we could be faced with a staggering lump sum payment as well. Although the Department of Labor will not begin enforcing the FLSA until October 15, the City is potentially liable, retroactively, from April 15, 1985. Further, these costs will be added to anticipated wage increases currently being negotiated with labor organizations. These unanticipated increases cause a multi-million dollar gap between projected revenue and expense which will have to be closed through additional local revenues or reduced services.

The bald economic fact is: the City of Chicago cannot afford the added costs imposed by the Garcia decision. At this time, the City of Chicago, like most cities, is struggling with massive reductions in federal aid and is diligently trying to stretch its budget to preserve important services presently

being provided. In the last two years, we have been forced to cut the City budget by \$50.2 million and the City payroll by 3,221 jobs.

The money to meet the costs of the newly-imposed requirements of the FLSA is certainly not in our budget for this fiscal year, which commenced on January 1, more than 6 weeks before the Garcia decision was handed down. And for our 1987 fiscal year, we are facing termination of the federal revenue sharing program as well -- a loss of approximately \$66.8 million a year, which constitutes 5.6% of our City's annual operating budget. We already predict that the loss of the revenue sharing funds will force the City to choose between cutting its payroll by 2,300 jobs and increasing local taxes. In addition to mandated cost increases from the FLSA and the loss of General Revenue Sharing, Chicago will also suffer from cutbacks in other federally funded programs such as the Community Development Block Grants.

In sum, the Garcia decision on February 19 of this year, which was totally unexpected, is intolerable for the City of Chicago. Like the revenue sharing reduction, the costs of full compliance with the FLSA can be met only through a combination of further service reductions, employee layoffs, and much higher local taxes. Under these circumstances, it is only fair for the Congress which has drastically reduced our funding to relieve the City of the additional burdens mandated by the Garcia decision. For all these reasons, I urge this body to amend the statute so as to exempt local governments like Chicago from the overtime provisions of the FLSA.

Thank you.



State of Wisconsin
Office of the Governor

Anthony S. Earl

July 19, 1985

The Honorable Don Nickels
Chair, Senate Sub-Committee on Labor
428 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senator Nickels and Committee Members:

The purpose of this letter is to inform you of the effects of the Garcia v. San Antonio Metropolitan Transit Authority decision on the State of Wisconsin as an employer.

The Supreme Court's recent decision in Garcia presents some serious fiscal and operating problems for the State of Wisconsin. The primary effect of Garcia on the State is related to extending the overtime provisions of the Fair Labor Standards Act (FLSA) to employees of the State. We are currently in the process of undertaking a review of the potential cost impact of the FLSA and we do not have the final figures at this time of the costs for all State employees. However, we can share with you some information related to what we estimate the cost to be for implementing the FLSA associated with regulating the State's wildlife and fire control programs since it appears that these programs will be most affected by the implementation of the FLSA. In the wildlife and fire control areas alone, we estimate that the overtime costs for our conservation warden workforce will be \$4.4 million for the next two years. The estimated overtime costs for the fire control workforce is about \$1.7 million for the next two years as well. We are very much alarmed by these costs, particularly since resources in these program areas seem to be diminishing. Moreover, in order to fund such exorbitant overtime costs, we will be forced to raise the cost of services that are provided to the public, such as hunting and fishing licenses. The citizens of this State will be harmed by any additional increases in the cost of services in these programs.

We are faced with a serious dilemma related to how the State will fund these additional overtime costs. We do not view cutting back on services or curtailing the level of services we provide as a viable alternative. Diminishing the level of services provided in these areas will pose serious problems in the protection of the environment and will limit the access of these services to the public. Therefore, the FLSA will impair our ability to provide an acceptable level of service to the public, particularly in the area of conservation law enforcement.

State Capitol
P.O. Box 7863
Madison, WI 53707-7863
808-266-1212

Another problem area for the State is the restricted use of compensatory time under the FLSA. The State has had the flexibility of granting "comp" time to employees in lieu of cash overtime payments. "Comp" time as a substitute for overtime pay is practically eliminated by the FLSA. We recommend that the FLSA be amended to include a provision to grant employees the option to elect either "comp" time or cash payment for overtime hours worked. If employees were granted such an option, governmental employers would not find it necessary to drastically restructure their employees' work periods to avoid massive overtime liability.

The FLSA poses a problem for the State's commitment to provide alternative work patterns and flexible scheduling for its employees. The State of Wisconsin has a strong commitment to affirmative action and as a means of promoting affirmative action in its employment practices, an explicit policy to allow flex-time has been adopted. The FLSA seems to be very inflexible about granting overtime equal to one and one-half times employees' regular rate of pay for hours over forty in a seven-day work week for the majority of covered employees. The cost of continuing our flex-time and alternative work pattern programs will increase substantially and we fear that these increased costs will seriously impair our ability to allow employees to participate in these programs.

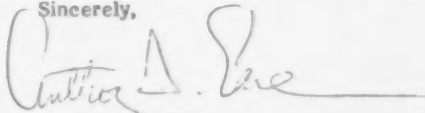
We surely will begin to see a retrenchment in the gains that we have made in this State in affirmative action if we do not get the relief that we seek to allow more flexibility in the administration of the FLSA. It is our understanding that federal employees are covered by a special exemption which allows the utilization of flex-time programs on a wide-scale basis. We recommend that this type of exemption be extended to state and local governments as well.

Lastly, there will be exorbitant costs associated with modifying the State's payroll and data processing systems to ensure compliance with the FLSA. Given the complexities involved with fully complying with all requirements, we strongly urge that state and local governments be given a substantial time extension in which to fully comply with FLSA.

We join with other states in voicing our concerns regarding the adverse and serious ramifications that the Garcia decision will have on state governments. The Garcia decision will pose a financial hardship on both the State and its citizens. We solicit your help in obtaining whatever administrative relief possible to address the concerns raised herein.

On behalf of the people of the State of Wisconsin, I thank you for the opportunity to provide information on the effects of the Garcia decision.

Sincerely,



Anthony S. Earl
GOVERNOR

STATEMENT OF THE CHICAGO PARK DISTRICT
TO THE SENATE SUBCOMMITTEE ON LABOR
CONCERNING THE FAIR LABOR STANDARDS ACT

This statement is submitted on behalf of the Chicago Park District in support of an amendment to the Fair Labor Standards Act that would exempt local government bodies like the Park District from the FLSA's narrow and inflexible overtime provisions.

The Chicago Park District is an independent governmental and taxing authority which is responsible for the provision and operation of a wide variety of recreational facilities for the three and one-half million citizens of Chicago. It operates and maintains 568 parks, 31.5 miles of beaches, over 80 swimming pools, a world-renowned zoo, a gigantic sports stadium and hundreds of athletic fields and courts. The Park District has an annual budget of over \$130 million and nearly 4,000 full-time employees.

Much of the Park District's work is highly seasonal in nature. The usage of recreational facilities, as you might expect, increases geometrically during the warm-weather months, and the employees of the Park District must respond to this heightened demand for services. As with any garden or farm, the tasks of maintaining our 7,308 acres of grass, shrubs, flowers, and trees fall most heavily during the warm-weather months of the year. Lakefront beaches and outdoor swimming pools open for these months, citizens flock to the tennis courts and baseball diamonds during this time,

and children take to the playgrounds. Even a facility like the Lincoln Park Zoo, which is open all year, draws countless more visitors when the weather is warm. All of these facilities have acute and extensive needs for operational and maintenance services, including grass cutting, landscaping, pool maintenance, refuse collection, etc., during the late spring and summer. During the winter months, however, our needs are different. For example, the services of stationary engineers are in heavy demand in order to operate the powerhouses which generate steam to heat the Park District's buildings.

Thus, the Park District has the difficult task of meeting these seasonal needs, on the one hand, while attracting and maintaining a competent, dependable labor force, on the other. The way in which this balance has been maintained is through extensive use of compensatory time-off arrangements. Rather than laying off employees during the "slack" season and hiring additional employees during the "peak" season, the Park District allows its employees to take compensatory time off for the overtime hours they work.

These "comp time" arrangements have been in place for a long time and have proved satisfactory to the Park District, as employer, and to its employees, who would otherwise be subject to seasonal layoffs. By providing a reliable pay check throughout the year, we can attract and keep competent, efficient workers, and employees can serve

their fellow citizens without fear of periodically being cast off to the unemployment lines. The mutual satisfaction with the comp time arrangements is reflected in the results of collective bargaining as well. The Park District has collective bargaining agreements with a number of labor unions, which vigorously assert the interests of their members. Each contract has a compensatory time-off provision which features the kind of arrangement described above.

The recent decision in Garcia v. San Antonio Metropolitan Transit Authority, which extends the FLSA to local governmental bodies, completely upsets this delicate balance of interests. The rigid and inflexible overtime provisions included in the Act and regulations promulgated under it prohibit the kind of compensatory time off program which the Park District has long used successfully. The Park District's labor contracts must all be renegotiated - and the choice between additional time off and additional money will be removed as a subject of bargaining.

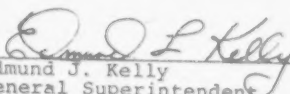
The economic result, of course, is even more staggering. The primary source of the Park District's funds is the property tax, a source which we cannot tap more than once in the course of a fiscal year. Indeed, Chicago's homeowners are groaning under the property taxes they are paying already, so that further increases from this source are severely limited.

Yet, if the Park District's longstanding compensatory time arrangements are invalidated, it will be forced to choose between substantially increased cash outlays for overtime during peak seasons or the hiring of additional employees during those months and subsequent wholesale layoffs during slack periods. A third alternative, of course, exists: massive reductions in the services offered to our citizens. Given the lack of additional funds, this is by far the likeliest alternative, although it will hurt not only the citizens who enjoy our parks but also the employees who inevitably will be laid off.

Ironically, the service reductions and layoffs promised by the FLSA's overtime provisions threaten to cause reverse discrimination while simultaneously rolling back the Park District's affirmative action progress. As a party to a consent decree requiring it to expand recreational services in areas of the City populated by minorities, the Park District is in no position to cut back on services evenhandedly but would have to visit the reductions disproportionately on the non-minority population. At the same time, since the Park District's affirmative action program means that minority employees comprise a disproportionate number of the individuals most recently hired, the seniority-based layoffs required under our labor agreements would fall most heavily on the minority population. These consequences of the economic blow delivered by the Garcia decision are perverse.

The severity of the service reductions and layoffs which Garcia portends may be exacerbated by still another cost. The Park District may, in fact, be required to pay workers in cash for all the hours of comp time accumulated since April 15, 1985, the date Garcia effectively extended the FLSA to local governments. This would be a very large cash payment indeed. And it certainly is not one which has been anticipated in the Park District's budget.

In short, the Chicago Park District faces a major crisis in the wake of the Garcia decision. For this reason, we vigorously seek an amendment to the Fair Labor Standards Act which would exempt us from the coverage of the overtime provisions of the FLSA. Section 213 of the Act already exempts from the FLSA's overtime provisions more than 20 categories of employees. Many of these are groups of employees whose jobs by their very nature require irregular work schedules - auto salesmen, fishermen, various employees of certain radio and television stations, and taxi drivers, for example. In fact, two categories of employees exempted from the FLSA's standard overtime provisions -- various employees working in national parks (§213(b)(29)) and agricultural workers (§213(b)(13)) -- perform work strikingly similar to the jobs performed by employees of the Chicago Park District. Congress has provided overtime exemptions for these national park and agricultural workers for reasons similar to those which lead us to submit this statement today. Accordingly, we urge Congress to pass legislation amending the Fair Labor Standards Act to exempt local governmental authorities like the Chicago Park District from the overtime provisions of the FLSA.


Edmund J. Kelly
General Superintendent
Chicago Park District



FEDERAL RELATIONS

Dr. Mack J. Spears
President

Thomas A. Shannon
Executive Director
Michael A. Resnick
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Lynne Glassman
Director, Network Operations
Katharine L. Herber
Legislative Counsel
Edward R. Kealy
Director, Federal Programs

TESTIMONY

on behalf of

THE NATIONAL SCHOOL BOARDS ASSOCIATION

on

STATE AND LOCAL GOVERNMENTS
AND THE FAIR LABOR STANDARDS ACT

before the

SUBCOMMITTEE ON LABOR
COMMITTEE ON LABOR AND HUMAN RESOURCES

420 Senate Dirksen Office Building

Submitted for the Record
July 30, 1985

NATIONAL SCHOOL BOARDS ASSOCIATION

1680 Duke Street, Alexandria, Virginia 22314 / (703) 838-6722

serving American education through school board leadership

Preface

The National School Boards Association is pleased to submit this statement for the record to the Senate Subcommittee on Labor. The National School Boards Association is the only major education organization representing school board members who govern the nation's public school districts. Throughout the nation, approximately 95,000 of these individuals are Association members. These people, in turn, are responsible for the education of more than 95 percent of the nation's public school children.

Currently marking its forty-sixth year of service, NSBA is a federation of state school board associations, with direct local school board affiliates, constituted to strengthen local lay control of education and to work for the improvement of education. Most of these school board members are elected public officials. Accordingly, they are politically accountable to their constituents for both education policy and fiscal management. As lay unsalaried individuals, school board members are in the rather unique position of being able to judge legislative programs purely from the standpoint of public education, without consideration to their personal professional interest.

INTRODUCTION

The Fair Labor Standards Act, Wage and Hour Provision raises unique compliance problems for school districts across the United States. This is so for several reasons.

Unlike other public institutions, school districts sponsor a number of non-academic school related activities which are dependent on community participation for their continuation. Examples of these activities include chaperoning at school dances and coaching athletic activities to sponsoring clubs or ushering at graduation.

In an effort to aid disadvantaged youths, schools often hire students to perform certain clerical functions for pay on a temporary basis during the school year. Additionally, a shortage of certified teachers in critical subject matter areas may force a school district to utilize academically qualified but, uncertified personnel from the private sector to teach in the public schools. Alternatively, in the event that a permanent teacher becomes ill or is otherwise absent, the school district might be compelled to temporarily replace the permanent certified teacher with a substitute teacher who is certified in a subject matter other than that which they are responsible for during their substitute tenure.

Furthermore, state law and school district policies often provide for payment of bonuses to employees who do not utilize the full amount of their sick leave.

The Fair Labor Standards Act Wage and Hour Provisions would operate to curtail many of the activities and practices noted above by penalizing both the school districts and the individual participants for their contribution to the public school system. These activities and practices are discussed at greater length below.

I. VOLUNTEERS

A. SCHOOL DISTRICT EMPLOYEES WHO VOLUNTEER FOR NON-TEACHING DUTIES.

Often, school district employees volunteer to perform services for the schools during extracurricular activities or other school related activities outside the regular school day. For example, ushering at graduation or school plays, chaperoning at school dances, coaching athletic activities, sponsoring clubs or cheerleading squads. These employees are not required, or even strongly encouraged, to perform these services. They do so for a variety of reasons, many times because their own children are participating in the activities.

NSBA anticipates that the Department of Labor may refuse to allow the school district to treat these persons as "volunteers". This conclusion is based on two facts: 1) they are employees of the district when not performing the "volunteer" services and 2) the school district might hire others to perform the services absent the "volunteer" service.

Should the Department refuse to treat these persons as volunteers, the district would be required to include the time spent by these covered non-exempt employees in calculations for the purpose of determining wages and overtime. In turn, this may compel school districts to refuse regular school employees the opportunity to perform these types of services because of the undue expense.

B. NON-SCHOOL DISTRICT EMPLOYEES PAID A FIXED STIPEND.

Many school districts have a practice of using parents and other interested "volunteers" to coach cheerleaders and teams, direct plays, and usher at the graduation. These "volunteers" are paid a small lump sum stipend for their time. There is no monetary incentive in accepting these jobs. The stipends are only a way of saying "thank you". Very often the "volunteers" are parents of students participating in the activity. School districts cannot afford to treat these "volunteers" as employees. However, under current law they will be forced to discontinue their "thank you" payments.

II. STUDENTS

Students are used in a variety of different ways in the schools: answering phones in the office, acting as guides for visitors, helping out in the lunchroom during the lunch hour.

Services performed by the students are helpful to the school but not essential. Although the pay received by the students is not great, it gives students an opportunity to earn wages which would otherwise be unavailable to them. This is particularly true of students who perform services for the school during the regular school day. However, inclusion of these temporary jobs under the minimum wage and hour provision will adversely impact the funds available for such positions and, will cause school districts to review their availability in the future.

III. BONUSES

State law and school district policies often provide for payment of bonuses to employees who do not utilize the full amount of their sick leave. These bonuses are paid at the end of each academic year. If these bonuses are included in the calculation of employee wages school districts may feel financially compelled to discontinue the practice; a result which benefits neither the district nor the employee.

IV. CERTIFICATION OF TEACHERS

A. REGULAR TEACHERS

Although generally teachers are exempt employees under the Fair Labor Standards Act, the Department has interpreted the law to require that teachers be certified in order to be included

within the exemption. Thus, the Department looks at the individual employee, rather than at the services performed by the employee, to determine whether they are exempt.

That narrow interpretation is unworkable under existing practices in school districts across the country for several reasons.

The shortage of certified teachers in many important subject areas (i.e., math and science) has forced many States to utilize qualified personnel from the private sector to teach in the public schools. Because they are not formally certified as teachers, they do not come within the exemption. NSBA believes that this result flies in the face of the rationale behind the exemption.

Further, there are situations wherein part-time certified teachers are employed as full time coaches during the athletic season. Such coaches would not be considered teachers under Department of Labor's interpretation of the Fair Labor Standards Act, though State law often does not require coaches to be certified. Even if required to be certified, the coaches certification might be in English or history; again, placing them outside the parameters of the exemption.

B. SUBSTITUTE TEACHERS

A similar certification problem exists with substitute teachers. A substitute teacher may be certified in one area but be hired to teach in a different area. Although qualified to teach the course on the basis of degree, the fact that the certification was in another area may lead the Department to refuse to treat the substitute as an exempt employee. Therefore, all preparation time -- in addition to actual classroom time -- would have to be included in calculations for the purpose of determining time worked.

V. COVERAGE OF PUBLIC EMPLOYEES UNDER THE FAIR LABOR STANDARDS ACT

Given the unique nature of the public sector and the myriad of financial and management problems which do not exist in the private sector, NSBA urges Congress to address the question of whether all public employees should be included within the Wage and Hour Provisions of the Fair Labor Standards Act.

NSBA believes that rather than accepting the Supreme Court's decision in Garcia v San Antonio Metropolitan Transit Authority as a mandate to include public employers within the Act, Congress should treat the case as permission for such inclusion.

A full scale public debate should begin immediately, giving taxpayers a chance to decide whether such inclusion is in their best interest. In the meantime, the Fair Labor Standards Act must be amended to provide an opportunity for Congress to assess the impact of the Act on situations such as those noted at length herein in order that Congress might concisely and unambiguously articulate the parameters of exempt and non-exempt employees.

Congress and the Administration are in the process of cutting back Federal funding to public entities such as schools. If Congress is going to place the enormous financial and management burden of the minimum wage and hour requirements on the States, it should not be done by default, but through a vote on the floor of both houses.

Therefore, NSBA urges Congress to consider the full range of implications which inure to the Act, particularly in those instances wherein the purpose of the Act is obfuscated by its implementation. Further, NSBA urges Congress to amend the Fair Labor Standards Act, Wage and Hour Provisions for the purpose of allowing the policies and practices of school districts enunciated herein to remain intact. NSBA believes that school district policies and practices are not contrary to the intent of the Act, although inclusion of those practices and policies within the parameters of the Act works a hardship on parents, teachers, students and school districts.



Mississippi Department of Wildlife Conservation
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 Jackson, MS 39205-0451
 (601) 981-5300

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 Governor

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 Bay St. Louis, MS

S. T. Rayburn
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Lonnie E. Tadlock
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Champ Terney
 Indianola

A. G. Williams
 Osyka, MS

LON STRONG
 Executive Director

August 15, 1985

The Honorable Don Nickles, Chairman
 Senate Subcommittee on Labor
 SH 608, Hart Office Building
 Washington, D. C. 20510

Re: Comments on Garcia Decision Concerning Fair
 Labor Standards Law

Dear Chairman Nickles:

The Mississippi Department of Wildlife Conservation wishes to comment on the adverse impacts on this agency by the Garcia Decision concerning the Fair Labor Standards Act (FLSA). There are 426 employees in the Mississippi Department of Wildlife Conservation of which 234 have law enforcement duties. It is in the area of law enforcement that FLSA has placed a tremendous burden and hardship on dedicated and hard working enforcement agents, the sportsmen of this state and the general public.

Over the years the Mississippi Department of Wildlife Conservation officers have provided effective and instant response in matters of life and death. We have responded to emergencies such as lost persons, drownings, and gas well leaks. We have responded in times of natural disasters such as tornados and hurricanes. Mississippi Department of Wildlife Conservation employees are considered to be the first in responding in time of public need. This response is due to their knowledge of the rural areas and forests and waters of Mississippi and to the equipment they have available such as all terrain vehicles, boats, etc. The general public has come to demand and expect the availability of the agency's personnel on a 24-hour basis. The following facts point out why the Garcia Decision has caused such a burden:

1. The work load is seasonal. October through February is a demanding period since most hunting seasons fall between these dates.

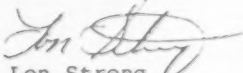
Page 2

The Honorable Don Nickles, Chairman
Senate Subcommittee on Labor

2. Scheduling wildlife law enforcement work is all but impossible because officers must respond to violations regardless of the time that the violations occur.
3. Headlighting or nightlighting of deer is a very real problem and a serious violation. These violations obviously occur at night while the legal hunting hours are one-half (½) hour before sunrise until one-half (½) hour after sunset.
4. To require officers to work eight (8) hours per day, five (5) days per week during both heavy work load periods and light work load periods will erase the effectiveness of law enforcement. Services to the public will be jeopardized.
5. Having limited enforcement personnel to patrol and protect wildlife, fisheries, and marine resources statewide and in the Gulf of Mexico on a restricted budget makes for a difficult and unique task without being penalized with regulations as to working hours.

Any action that can be taken to negate the Garcia Decision by exempting states and their political sub-divisions from overtime provisions of the FLSA will be rendering a great service to the people of Mississippi and to this Nation.

Sincerely,


Lon Strong
Executive Director

LS:mjw

cc: Governor Bill Allain

Commission on Wildlife Conservation

STATEMENT BY ROBERT R. KILEY, CHAIRMAN,
METROPOLITAN TRANSPORTATION AUTHORITY OF
NEW YORK STATE (MTA), BEFORE THE UNITED
STATES SENATE COMMITTEE ON LABOR AND
HUMAN RESOURCES, SUBCOMMITTEE ON LABOR,
SENATOR DON NICKLES, CHAIRMAN

Chairman Nickles and members of the subcommittee, I am Robert R. Kiley, chairman of the Metropolitan Transportation Authority of the State of New York. I am pleased to have the opportunity to testify about the devastating and counterproductive impact the Fair Labor Standards Act (FLSA) would have if the act should prove to be applicable to state and local mass transit employees. In particular, I want to describe the serious burden the act's requirements could impose on the New York mass transit network.

The MTA, the agency I head, is a New York State-chartered public benefit corporation. It is responsible for most of the public transit in New York City and the eastern and northern suburbs, covering 12 New York State counties and extending into Connecticut.

The operating units of the MTA are: the New York City Transit Authority, the Staten Island Rapid Transit Operating Authority, The Long Island Rail Road Company, the Metro-North Commuter Railroad Company, the Metropolitan Suburban Bus Authority, and the Triborough Bridge and Tunnel Authority. We carry nearly 2 billion riders a year, 6.3 million on an average weekday, making MTA the nation's largest transportation system. Our 1985 operating budget is approximately \$4 billion, and our capital budget is nearly \$2 billion.

As you no doubt are aware, we in public transit are under tremendous pressure from the public to hold fares to affordable levels while rebuilding our plant and carrying out badly needed service improvements. As we struggle to do so, the federal government is retreating from its historic role in aiding and supporting mass transit, leaving states and cities to shoulder the increasing burden of public services. In states like New York, where budgets are already strained and taxes are high, raising taxes further is not a realistic option. It is particularly ironic and hurtful that at this juncture, when the states and localities are expected to provide so much more, the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transportation Authority has suddenly and without warning added tremendously to their fiscal responsibilities while stripping them of the ability to structure appropriate overtime arrangements with public-employee unions. And it should be noted that the proposed FY 1986 budget and the Administration's proposed tax-reform package would only exacerbate this difficult situation.

Permit me to discuss what the Garcia decision, if applied to mass transit, could do to the MTA's largest component, the transportation system of New York City, operated by the New York City Transit Authority. The Transit Authority and its subsidiary, the Manhattan and Bronx Surface Transit Operating Authority, which I shall refer to collectively as the TA, carry 5.2 million subway and bus riders each work day and employ nearly 50,000 people.

The cost of these employees is the single largest component of the TA's \$2.8 billion dollar 1985 operating budget, constituting 54 percent of the subway and bus system's operating expenses. Overtime is a significant portion of these labor costs; we anticipate spending about \$113 million this year alone.

Applying the Garcia decision to transit would escalate these labor costs, and the impact on the overall budget would be serious, because labor is such a significant cost item for any transit system. It is impossible to assess today the precise amount that the FLSA could impose on the TA, because applying the act would demand far more than the sizeable labor costs involved. And therein lies one of the most troublesome aspects of Garcia: the indirect administrative costs entailed, costs that are wasteful, potentially enormous and not yet fully known.

The TA has 25 different unions and 21 different collective bargaining agreements. Over the past 31 years, these unions have negotiated with us a variety of complicated and sophisticated pay arrangements to compensate our hourly workers adequately, in keeping with the special requirements of our mass transit system. These contracts were negotiated outside the strictures of the FLSA, which did not then apply, and the task of assessing how our pay practices would be treated under the FLSA is extremely complex. Many of our work schedules and pay arrangements are unique to our industry and do not fall neatly within existing interpretations of the FLSA's provisions.

We are faced with the prospect of extensive legal fees and perhaps years of litigation just to determine whether and how to apply the FLSA to our operations. Furthermore, we would have to expend vast sums of money to change our record-keeping and payroll systems, which are premised on the requirements of our contracts, not on the FLSA. Complicated calculations would have to be performed every week for each of the T.A.'s nearly 50,000 employees to determine FLSA pay and to compare it with contract pay. This would require costly new computers and complex, detailed programming systems, as well as extensive retraining for several hundred personnel and perhaps the hiring of hundreds more. We estimate that it would cost the TA at least \$20 million to \$25 million in implementation costs alone to adhere to the FLSA.

This expenditure of money is regulatory bloat. It would not advance the goals of the FLSA. The employees who run the trains and buses would not get the money. And in the end, there is really no need for it. Our employees are well paid, far in excess of the minimum wage. For example, token clerks receive a top hourly rate of \$11.02, or \$22,900 per year, not including premiums or overtime; a bus driver gets up to \$12.60 per hour, or \$26,200 per year, not including premiums or overtime. Furthermore, all our employees earn at least time and one-half after 40 hours of work in a week or 8 hours in a day, as provided by our collective bargaining agreements.

We and our employees' unions have negotiated in good faith and arrived at complex pay arrangements. If the FLSA were to

override these arrangements, technical quirks could result in some dramatic increases in wages and pension benefits -- a substantial windfall unintended by the framers of the FLSA. This would also upset the delicate and painstakingly negotiated financial trade-offs achieved over years of collective bargaining.

Our bargaining agreements, after all these years, are firmly established. While the agreements are subject to periodic renegotiation, our unions would not agree to a massive and radical revision of their contracts to lessen the MTA's administrative expenses should the FLSA become applicable to transit agencies. They and the employees they represent are accustomed to and satisfied with these pay arrangements, and our unions are not about to relinquish the intricate compensation system carefully negotiated over the years.

Nor would we be able to cut back on overtime hours as a way of reducing the newly increased costs inflicted by the FLSA. Unforeseen and unavoidable operating difficulties, poor weather conditions and special public events are among the contingencies that compel us to use overtime to assure the availability of adequate public transport. The FLSA's goal of encouraging the hiring of more permanent workers would not be fulfilled -- overtime, not more workers on the payroll, is the only answer to our unpredictable needs.

By the slimmest of margins (a 5-4 vote), the Garcia decision abruptly abandoned the long-standing principle that state

and local governments should be allowed to direct their own destinies in fiscal matters. In addition, the Garcia result is totally at odds with the Administration's policy of shifting responsibilities for public services to the state and local governments. So Garcia is consonant neither with principle nor public policy.

The Garcia decision, unless ameliorated by appropriate legislation, could prove to be an unnecessary, unplanned and unintended expense for mass transit. It could force the MTA, and our sister transit agencies throughout the nation, to divert sizeable amounts of shrinking revenues to satisfy its mandate. Few would benefit: We would not be hiring new operating employees, only administrators and clerks to handle the regulatory burden. The losers would be our riders, whose fares would have to rise to defray the costs; our transit systems, which would lose ridership and revenues as fares rose; and the economy of our region, which would suffer as a result of a more expensive but not more efficient transit network.

That is why I exhort you, in the strongest possible terms, to undo Garcia. If public transit is to bear the fiscal responsibility for providing services at the local level, each system must have the flexibility and the money to meet the demands created by local conditions. Remedial legislation is needed now to exempt public mass transit employees from the onerous requirements of the FLSA.

Thank you.

STATEMENT BY MICHAEL P. ROCHE
ON BEHALF OF THE TOWN OF STONEVILLE, NORTH CAROLINA

Mr. Chairman and members of the Subcommittee on Labor, I am Michael P. Roche the Town Manager of Stoneville, North Carolina. I am testifying on behalf of the Town of Stoneville and other small cities which are members of the Piedmont Triad Council of Governments regarding the impact of the Fair Labor Standards Act on small cities.

The recent Supreme Court decision to allow the Fair Labor Standards Act to be imposed on local governments has created an almost insurmountable problem for our governments and thus our citizens. Tax increases are inevitable due to the significant increases in personnel costs. If this route is not taken, local governments will have to reduce services to minimize the increase in taxes, thus providing less return to our citizens for the taxes they pay.

The impact on Stoneville is mainly in the Police Department which will have a payroll increase of \$18,000.00 (amount based upon a four month cost of \$6,200.00 in a four month period since April). This increase in costs is the equivalent of a seven cent increase in our property tax. The Stoneville Police Department consists of four full time and two part time officers; the part time officers allow us to give our full time officers compensatory time off for overtime earned in the performance of their duties. Without these part time officers we would not be liable for Fair Labor Standards, but neither would we be able to perform our jobs as prescribed by State and Local law. Compensatory time also allows us to provide the necessary training for our officers which minimizes our public liability and increases our officers' work skills and job performance. The overtime provisions have increased our costs to such a degree that we will be forced to either increase taxes, decrease our services, or terminate our part time employees which would not allow us to provide adequate police coverage for our town. Another option would be to prohibit all overtime in our police department. This would mean that we would not be able to enforce the law in Stoneville. Examples of laws that could not be enforced are: Intoxicated drivers would not be stopped due to the extensive overtime costs of court appearances and follow up investigations on reported crimes (i.e. worthless checks, breaking and entering, murder, domestic violence, drug investigations, etc.) would be difficult to conduct. An aspect of the Fair Labor Standards Act that has a severe impact on the Police Department is the way in which it lowers officers' morale. They feel they are not able to perform their duties in the manner in which they have been trained.

We contacted four other small towns which are members of the Piedmont Triad Council of Governments and found the following problems related to the Fair Labor Standards Act:

Madison with a population of 2,829 has been able to minimize the impact on police costs to a \$6,000.00 increase in personnel costs. This was done by rescheduling their sworn and non-sworn police employees. This rescheduling will result in a loss of coverage in their radio room and force them to use a sworn officer as a dispatcher, thus reducing their ability to respond to calls.

Mayodan with a population of 2,556 has compensated for any anticipated overtime costs for their police department by budgeting positions at the top of their salary grade although the officers may not reach that salary grade until late in the year. There are also some scheduling changes and budget increases in the next fiscal year.

Jamestown with a population of 2,262 has no police department since it contracts with the Guilford County Sheriff's Department. The cost of the contract has increased from \$103,000 to \$116,000 an increase of \$13,000 for overtime. The town will also pay an additional \$3,000 increase in personnel costs in the recreation department.

Gibsonville with a population of 3,172 has had an overall increase of \$13,000 in budgeted personnel costs for this fiscal year due to this Act.

This unasked for increase in expenditures, as well as other potential mandated expenditures that are before Congress, as well as the loss of Revenue Sharing, would create in Stoneville a budget deficit of 10% which in North Carolina is not allowed for State and Local Governments. With these costs in mind, we would ask you to support S. 1570 which will eliminate the overtime and volunteer time provisions of the Fair Labor Standards Act as they apply to State and Local Governments. S. 1570 would allow us to return to normal, thus providing our citizens with adequate police protection at a fair and equitable cost that meets the needs of the employees and taxpayers alike.



American Ambulance Association

16 September 1985

The Honorable Don Nickles
Chairman, Subcommittee On Labor
United States Senate
Washington D.C. 20510

RE: OPPOSE STATE/LOCAL EXEMPTION FROM FAIR LABOR
STANDARDS ACT OVERTIME PAY REQUIREMENTS;
GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

Dear Senator Nickles,

The Association, on behalf of its 650 private ambulance company members, urges you to oppose efforts to exempt state/local governments from the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA).

State/local government representatives mischaracterize the effects of Garcia on provision of public safety services in order to perpetuate an unfair advantage over private enterprise. Such services are not necessarily "traditional government activities" in many American communities. The private ambulance companies of the Association provide emergency medical transport services in all fifty States, often more efficiently and with higher quality than public providers, which enjoyed unrealistically low labor costs resulting from the National League of Cities v. Usery exemption from the FLSA.

Exemption of state/local governments from the FLSA will lessen the beneficial effects of competition in provision of ambulance services; give local governments operating socialized ambulance services an unfair advantage in labor costs; and perpetuate unfair labor conditions in socialized governmental ambulance operations.

Enclosed is a copy of the Association's testimony before the Senate Labor & Human Resources Subcommittee on Labor on this issue. For the sake of both labor and private enterprise, oppose state/local government exemption from the FLSA.

Sincerely,

THE DAVID EPSTEIN GROUP, P.C.
Government Relations Representative

Michael Lovendusky /up
Michael Lovendusky

enclosure

AAA News Bureau: 1800 K Street, N.W., Suite 1105, Washington, DC 20006



American
Ambulance
Association

TESTIMONY BEFORE THE UNITED STATES SENATE
LABOR AND HUMAN RESOURCES SUBCOMMITTEE ON LABOR
REGARDING LEGISLATION TO EXEMPT STATE AND LOCAL GOVERNMENTS
FROM OVERTIME AND WAGE REQUIREMENTS OF
THE FAIR LABOR STANDARDS ACT AS REQUIRED BY
GARCIA v. SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY

9 September 1985

Michael Lovendusky
The David Epstein Group, P.C.
Government Relations Representative
THE AMERICAN AMBULANCE ASSOCIATION

AAA News Bureau: 1800 K Street, N.W., Suite 1105, Washington, DC 20006



American Ambulance Association

THE AMERICAN AMBULANCE ASSOCIATION, representing 650 private ambulance companies in every state of the nation, strongly opposes any exemption of state and local government employees -- including public safety officers -- from Fair Labor Standards Act (FLSA) overtime and wage requirements. The United States Supreme Court holding in Garcia v. San Antonio Metropolitan Transit Authority is sound and commendable. It will be a mistake if the discriminatory labor practices engendered by National League of Cities v. Usery is continued by legislative action in this Congress.

If it is the will of Congress to exempt local governments from the FLSA in some degree, the exemption should be sensitive to certain facts about the provision of ambulance service in America. In particular, any exemption legislation should: (1) also exempt private ambulance companies exclusively contracting their services to exempt local governments; and (2) not apply to those local government ambulance units and fire departments which charge for their services.

AAA News Bureau: 1800 K Street, N.W., Suite 1105, Washington, DC 20006

AMBULANCE SERVICE IS NOT NECESSARILY A GOVERNMENTAL FUNCTION

There is a tremendous variety of ways emergency medical transportation services are provided in the communities of America. Ambulance services have been provided by private enterprise for decades in many localities, and there are some private ambulance companies more than 100 years old. At the other extreme, some cities operate completely socialized ambulance systems, sometimes called public utility model systems. There are many variations in between: municipal fire departments which operate paramedic rescue units but leave transport to private companies; volunteer ambulance companies which do all levels of work and charge fees which range from \$0 to fair market rates; cities which provide emergency transport but leave all non-emergency transports to private companies; cities which contract exclusively with a private company for the provision of all transport services -- the different ways of providing ambulance service are as diverse as are the neighborhoods of this nation.

This fact supports several findings of the Supreme Court in Garcia. First, the provision of ambulance service is not a "traditional governmental function" requiring the use of public safety officers. Instead, provision of ambulance service is traditionally a function of private enterprise in many localities. Second, the provision of ambulance service for a population is not static: it

changes in nature with the population, the resources available (both public and private), and the inclination of the political leadership of a community. It is good that provision of ambulance service is not static. The availability of competitive ambulance service alternatives contributes beneficially to improvements in emergency medical transportation systems such as we have witnessed in the past ten years, in which ambulance service standards in the United States became the highest in the world.

EXEMPTION OF LOCAL GOVERNMENTS FROM FLSA REQUIREMENTS
LESSENS THE BENEFICIAL EFFECTS OF COMPETITION IN THE
PROVISION OF AMBULANCE SERVICES

Exemption of local governments operating socialized ambulance services gives local governments an unfair advantage in labor costs. But there is no justifiable reason to grant legislatively the advantage of cheap labor to the local government ambulance unit when private ambulance companies exist that can provide service with quality equal or superior to that available from public ambulance units. Indeed, in some ambulance service contracting competitions across the nation, cheap labor afforded by FLSA exemption can make the marginal difference which results in a contract award going to socialized rather than private service.

Congressional committees should understand that the profitability of a well-managed ambulance service has increased local government efforts to monopolize ambulance

services. While the local government often promises the desirable goal of improving ambulance service in one way or another, the true impetus behind local government interest is to bring a money-making enterprise into the ambit of the local government to help make budgetary ends meet. For example, in Gold Cross Ambulance Co. v. Kansas City, 705 F.2d 1005 (8th Cir. 1983), cert. pending, No. 83-183, the city purchased the assets and licenses of four private ambulance companies to operate a city-owned, profit-making ambulance service through a private management company. The city monopoly provides emergency and non-emergency service. To assure the financial success of its venture, the city prohibits by ordinance any competition with its ambulance company within its political boundaries. The only reason ambulance service ends up being provided by the city rather than private enterprise is because of the benefits government grants itself in such areas as antitrust immunity, cheap labor, taxation, and so on.

This case and many others like it arise because the inspiration for local governments getting into the ambulance business is as much revenue enhancement as anything else. See generally Unfair Competition by Nonprofit Organizations With Small Business, U.S. Small Business Administration (3d Ed. 1984). An increasing number of city fire departments and ambulance units charge for their services. In some neighborhoods, the public fire department will not put out a house fire if the homeowner

has not paid for the service. In other areas, a medical patient will deliver a bill from the fire department ambulance unit for services rendered just as if the service was rendered by a private ambulance company. Homeowner and medical insurance carriers will reimburse beneficiaries for these costs. In short, ambulance service and even fire protection is as much a business for government as it is for private companies. Ambulance service is a commercial venture.

There is nothing wrong with a local government making money in an enterprise. But it is inequitable to favor local governments with an advantage in labor costs over private companies. Local governments should compete with private enterprise on the same ground, for all the benefits and reasons provided by free market competition. There is no justifiable reason to discriminate in labor standards between private and socialized ambulance service.

EXEMPTION OF LOCAL GOVERNMENTS FROM THE FLSA
WILL PERPETUATE UNFAIR LABOR CONDITIONS IN
SOCIALIZED GOVERNMENTAL AMBULANCE OPERATIONS

Working conditions in public ambulance units are substandard compared to private ambulance companies. Hours are longer, pay is less, and benefits are inferior. The understaffing and overworking of public ambulance crews resulting from the National League of Cities FLSA exemption conflicts with public policy encouraging higher employment and improved public safety capability.

Even with FLSA coverage, working conditions in public ambulance units will remain substandard in comparison to those in private ambulance companies because of FLSA Section 7(k), which grants disparate FLSA coverage to public safety employees of local governments. No worker other than the fire department emergency medical technician or fire fighter has to work a 53-hour work-week before being paid overtime.

The discriminatory preference already existing in FLSA Section 7(k) provides sufficient scheduling flexibility to local governments to accommodate whatever adjustments must be made by local governmental ambulance units and fire departments to comply with FLSA standards. To perpetuate the substandard working conditions now endured by local government ambulance unit employees is not merely unfair to the workers, but endangers public safety itself. Stories of paramedic "burn-out" are all too common -- due in part to the tendency by local governmental ambulance units to overwork their emergency medical technicians and paramedics.

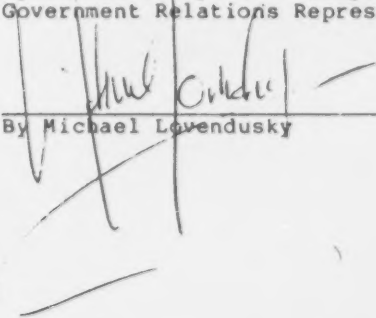
CONCLUSION

It is paradoxical that labor conditions were permitted to exist below federal standards for almost a decade in an activity so important to the public welfare -- the provision of emergency medical transportation services. The Garcia decision at last will permit the congressional

will, evidenced in the 1974 amendments to the FLSA, to take effect. The Association, on behalf of its private member companies, urges this Congress not to exempt local governments from the FLSA. Alternatively, if the Congress is convinced that some exemption must be provided, it should (1) extend the exemption to privately-owned public safety services, including ambulance services, exclusively contracted for by local government; or (2) not exempt any local government employer which charges fees for service.

Respectfully submitted,

THE AMERICAN AMBULANCE ASSOCIATION
By The David Epstein Group, P.C.
Government Relations Representative


By Michael Lovendusky

Senator NICKLES. Thank you for coming. We will adjourn the hearing at this time.

[Whereupon, at 12:30 p. m., the subcommittee was adjourned.]

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